REPORTS

OF

Cases Argued and Determined

IN THE

COURT of CLAIMS

OF THE

STATE OF ILLINOIS

VOLUME 19

Containing cases in which opinions were filed and orders of dismissal entered, without opinion, between July 1, 1949 and June 30, 1950,

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SPRINGFIELD, ILLINOIS

1950

[Printed by authority of the State of Illinois.]

(30559)

PREFACE

The opinions of the Court of Claims herein reported are published by authority of the provisions of Section 18 of an Act entitled "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named," approved July 17, 1945.

EDWARD J. BARRETT,
Secretary of State and Ex Officio Clerk of the Court of Claims.

OFFICERS OF THE COURT

JUDGES

FRED P. SCHUMAN, *Chief Justice*
Granite City, Illinois

ROBERT L. LANSDEN, *Judge*
Cairo, Illinois

F. DONALD DELANEY, *Judge*
Joliet, Illinois

IVAN A. ELLIOTT, *Attorney General*

EDWARD J. BARRETT,
Secretary of State and Ex-Officio Clerk of the Court

BELLE P. WHITE, *Deputy Clerk*
Springfield, Illinois

RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

Adopted pursuant to "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named." (Approved July 17, 1945. L. 1945, p. 660.)

TERMS OF COURT

Rule 1. The Court shall hold a regular session at the Capital of the State on the second Tuesday of January, May and November of each year, and such special sessions at such places as it deems necessary to expedite the business of the Court.

PLEADINGS

Rule 2. Pleadings and practice at common law as modified by the Civil Practice Act of Illinois shall be followed except as is herein otherwise provided.

Rule 3. The original and five copies of all pleadings shall be filed with the Clerk and the original shall be provided with a suitable cover, bearing the title of the Court and cause, together with a proper designation of the pleading printed or plainly written thereon.

Rule 4. (a) Cases shall be commenced by a verified complaint which shall be filed with the Clerk of the Court. A party filing a case shall be designated as the claimant and the State of Illinois shall be designated as the respondent. The Clerk will note on the complaint and each copy the date of filing and deliver one of said copies to the Attorney General.

(b) Only a licensed attorney and an attorney of record in said case will be permitted to appear for or on behalf of any claimant, but a claimant, although not a licensed attorney, may prosecute his own claim in person. All appearances, including substitution of attorneys, shall be in writing and filed in the case.

(c) The complaint shall be printed or typewritten and shall be captioned substantially as follows:

VI

IN THE COURT OF CLAIMS OF THE
STATE OF ILLINOIS

A. B.,
Claimant
vs.
STATE OF ILLINOIS,
Respondent
} No.

Rule 5. (a) The claimant shall state whether or not his claim has been presented to any State department or officer thereof, or to any person, corporation or tribunal, and if so presented, he shall state when, to whom, and what action mas taken thereon.

(b) The claimant shall in all cases set forth fully in his petition the claim, the action thereon, if any, on behalf of the State, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of the claim or any part thereof or interest therein has been made, except as stated in the petition; that the claimant is justly entitled to the amount therein claimed from the State of Illinois, after allowing all just credits; and that claimant believes the facts stated in the petition to be true.

(c) If the claimant bases his complaint upon a contract or other instrument in writing a copy thereof shall be attached thereto for reference.

Rule 6. (a) A bill of particulars. stating in detail each item and the amount claimed on account thereof. shall be attached to the complaint in all cases.

(b) Where the claini arises under the Workmen's Compensation Act or the Occupational Diseases Act, the claimant shall set forth in the complaint all payments, both of compensation and salary, which have been received by him or by others on his behalf since the date of the injury; and he shall also set forth in separate items the amount incurred, and the amount paid for medical, surgical and hospital attention on account of his injury, and the portion thereof, if any, which was furnished or paid for by the respondent.

Rule 7. If the claimant be an executor, administrator, guardian or other representative appointed by a judicial tribunal, a duly authenticated copy of the record of appointment must be filed with the complaint.

Rule 8. If the claimant die pending the suit the death may be suggested on the record, and the legal representative, on filing a

duly authenticated copy of the record of appointment as executor or administrator, may be admitted to prosecute the suit by special leave of the Court. It is the duty of the claimant's attorney to suggest the death-of the claimant when that fact first becomes known to him.

Rule 9. Where any claim has been referred to the Court by the Governor or either House of the General Assembly, any party interested therein may file a verified complaint at any time prior to the next regular session of the Court. If no such person files a complaint, as aforesaid, the Court may determine the case upon whatever evidence it shall have before it, and if no evidence has been presented in support of such claim, the case may be stricken from the docket with or without leave to reinstate, in the discretion of the Court.

Rule 10. A claimant desiring to amend his complaint, or to introduce new parties may do so at any time before he has closed his testimony, without special leave, by filing five copies of an amended complaint, but any such amendment or the right to introduce new parties shall be subject to the objection of the respondent, made before or at final hearing. Any amendments made subsequent to the time the claimant has closed his testimony must be by leave of Court.

Rule 11. The respondent shall answer within thirty days after the filing of the complaint, and the claimant shall reply within fifteen days after the filing of said answer, unless the time for pleading be extended; provided, that if the respondent shall fail so to answer, a general traverse or denial of the facts set forth in the complaint sliall be considered as filed.

EVIDENCE

Rule 12. At the next succeeding term of court after a case is at issue, the Court, upon call of the docket, shall set the same for hearing.

Rule 13. All evidence shall be taken in writing in the manner in which depositions in chancery are usually taken. All evidence when taken and completed by either party shall be filed with the Clerk on or before the first day of the next succeeding regular session of the Court.

Rule 14. All costs and expenses of taking evidence on behalf of the claimant shall be borne by the claimant, and the costs and expenses of taking evidence on behalf of the respondent shall be borne by, the respondent, except in cases arising under the Workmen's Compensation and Occupational Diseases Acts.

Rule **15.** If either party fails to file the evidence as herein required, the Court may, in its discretion, proceed with its determination of the case.

Rule **16.** All records and files maintained in the regular course of business by any State department, commission, board or agency of the respondent and all departmental reports made by any officer thereof relating to any matter or case pending before the Court shall be prima facie evidence of the facts set forth therein; provided, a copy thereof shall have been first duly mailed or delivered by the Attorney General to the claimant or his attorney of record.

ABSTRACTS AND BRIEFS

Rule 17. The claimant in all cases where the transcript of evidence exceeds twenty-five pages in number shall furnish a complete typewritten or printed abstract of the evidence, referring to the pages of the transcript by numerals on the margin of the abstract. The evidence should be condensed in narrative form in the abstract so as to present clearly and concisely its substance. The abstract must be sufficient to present fully all material facts contained in the transcript and it will be taken to be accurate and sufficient for a full understanding of such facts, unless the respondent shall file a further abstract, making necessary corrections or additions.

Rule 18. When the transcript of evidence does not exceed twenty-five pages in number the claimant may file the original and five copies of such transcript in lieu of typewritten or printed abstracts of the evidence, otherwise the original and five copies of an abstract of the evidence shall be filed with the Clerk. The original shall be provided with a suitable cover, bearing the title of the Court and case, together with the name and address of the attorney filing the same printed or plainly written thereon.

Rule 19. Each party may file with the Clerk the original and five copies of a typewritten or printed brief setting forth the points of law upon which reliance is had, with reference made to the authorities sustaining their contentions. Accompanying such briefs there may be a statement of the facts and an argument in support of such briefs. The original shall be provided with a suitable cover, bearing the title of the Court and case, together with the name and address of the attorney filing the same printed or plainly written thereon. Either party may waive the filing of his brief and argument by filing with the Clerk a written notice and five copies to that effect.

Rule 20. The abstract, brief and argument of the claimant must be filed with the Clerk on or before thirty days after all evidence has been completed and filed with the Clerk, unless the time

for filing the same is extended by the Court or one of the Judges thereof. The respondent shall file its brief and argument not later than thirty days after the filing of the brief and argument of the claimant, unless the time for filing the brief of claimant has been extended, in which case the respondent shall have a similar extension of time within which to file its brief. Upon good cause shown further time to file abstract, brief and argument or a reply brief of either party may be granted by the Court or by any Judge thereof.

Rule **21.** If either party shall fail to file either abstracts or briefs within the time prescribed by the rules,, the Court may proceed with its determination of the case.

EXTENSION OF TIME

Rule **22.** Either party, upon notice to the other party, may make application to this Court, or any Judge thereof, for an extension of time for the filing of pleadings, abstracts or briefs.

NOTIONS

Rule **23.** Each party shall file with the Clerk the original and five copies of all motions presented. The original shall be provided with a suitable cover, bearing the title of the Court and case, together with the name and address of the attorney filing the same printed or plainly written thereon.

Rule **24.** In case a motion to dismiss is denied, the respondent shall plead within thirty days thereafter, and if a motion to dismiss be sustained, the claimant shall have thirty days thereafter within which to file petition for leave to amend his complaint.

ORAL ARGUMENTS

Rule **25.** Either party desiring to make oral argument shall file a notice of his intention to do so with the Clerk at least ten days before the session of the Court at which he wishes to make such argument.

REHEARINGS

Rule 26. **A** party desiring a rehearing in any case shall, within thirty days after the filing of the opinion, file with the Clerk the original and five copies of his petition for rehearing. The petition shall state briefly the points supposed to have been overlooked or misapprehended by the Court, with proper reference to the particular portion of the original brief relied upon, and with authorities and suggestions concisely stated in support of the points. Any petition violating this rule mill be stricken.

Rule **27.** When a rehearing is granted, the original briefs of the parties and the petition for rehearing, answer and reply thereto shall stand as files in the case on rehearing. The opposite party shall have twenty days from the granting of the rehearing to answer the petition, and the petitioner shall have ten days thereafter within which to file his reply. Neither the claimant nor the respondent shall be permitted to file more than one application or petition for a rehearing.

Rule **28.** When a decision is rendered against a claimant, the Court, within thirty days thereafter, may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

RECORDS AND CALENDAR

Rule **29.** (a) The Clerk shall record all orders of the Court, including the final disposition of cases. He shall keep a docket in which he shall enter all claims filed, together with their number, date of filing, the name of claimants, their attorneys of record and respective addresses. As papers are received by the Clerk, in course, he shall stamp the filing date thereon and forthwith mail to opposing counsel a copy of all orders entered, pleadings, motions, notices and briefs as filed; such mailing shall constitute due notice and service thereof.

(b) Within ten days prior to the first day of each session of the Court, the Clerk shall prepare a calendar of the cases set for hearing, and of 'the cases to be disposed of at such session, and deliver a copy thereof to each of the Judges and to the Attorney General.

Rule **30.** Whenever on peremptory call of the docket any case appears in which no positive action has been taken, and no attempt made in good faith to obtain a decision or hearing of the same, the Court may, on its own motion, enter an order therein ruling the claimant to show cause on or before the first day of the next succeeding regular session why such case should not be dismissed for n-ant of prosecution and stricken from the docket. Upon the claimant's failure to take some affirmative action to discharge or comply with said rule, prior to the first day of the nest regular session after the entry of such order, such case may be dismissed and stricken from the docket with or without leave to reinstate on good cause shown. On application and a proper shoving made by the claimant the Court may, in its discretion, grant an extension of time under such rule to show cause. The fact that any case has been continued or leave given to amend, or that any motion or matter has not been ruled upon will not alone be sufficient to defeat the operation of

this rule. The Court may, during the second day of any regular session, call its docket for the purpose of disposing of cases under this rule.

FEES AND COSTS

Rule 31. The following schedule of fees shall apply:

Filing of complaint (escept cases under the Workmen's Compensation Act and the Occupational Diseases Act). $10.00

Certified copies of opinions :

Five pages or less.	$ 0.25
For more than five pages and not more than ten pages. .	0.35
For more than ten pages and not more than twenty pages	0.45
For more than twenty pages.	0.50

Rule 32. Every claim cognizable by the Court and not otherwise sooner barred by law,* shall be forever barred from prosecution therein unless it is filed with the Clerk of the Court within two years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues two years from the time the disability ceases.

ORDER OF THE COURT

The above and foregoing rules were adopted as the rules of the Court of Claims of the State of Illinois on the 11th day of September, A. D. 1945, to be in full force and effect from and after the first day of November, A. D. 1045.

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* See limitation provisions of specific statutes, including Workmen's Compensation and Occupational Diseases Acts.

COURT OF CLAIMS LAW

AN ACT *to create the Court of Claims, to prescribe its powers and duties, and to repeal an act herein named.*

Section **1.** The Court of Claims, hereinafter called the Court, is created. It shall consist of three judges, to be appointed by the Governor by and with the advice and consent of the Senate, one of whom shall be appointed chief justice. In case of vacancy in such office during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office. If the Senate is not in session at the time this Act takes effect, the Governor shall make temporary appointments as in case of vacancy.

Section **2.** The term of office of each judge first appointed pursuant to this Act shall commence July 1, 1945 and shall continue until the third Monday in January, 1949, and until a successor is appointed and qualified. After the expiration of the terms of the judges first appointed pursuant to this Act, their respective successors shall hold office for a term of four years from the third Monday in January of the year 1949 and each fourth year thereafter and until their respective successors are appointed and qualified.

Section **3.** Before entering upon the duties of his office, each judge shall take and subscribe the constitutional oath of office and shall file it with the Secretary of State.

Section 4. Each judge shall receive a salary of $4,000.00 per annum payable in equal monthly installments.

Section 5. The Court shall have a seal with such device as it may order.

Section 6. The Court shall hold a regular session at the Capital of the State beginning on the second Tuesday of January, May and November, and such special sessions at such places as it deems necessary to expedite the business of the Court.

Section **7.** The Court shall record its acts and proceedings. The Secretary of State, ex-officio, shall be clerk of the Court, but may appoint a deputy, who shall be an officer of the Court, to act in his stead. The deputy shall take an oath to discharge his duties faithfully and shall be subject to the direction of the Court in the performance thereof.

The Secretary of State shall provide the Court with a suitable

court room, chambers and such office space as is necessary and proper for the transaction of its business.

Section 8. The Court shall have jurisdiction to hear and determine the following matters:

A. All claims against the State founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency.

B. All claims against the State founded upon any contract entered into with the State of Illinois.

C. **All** claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against The Board of Trustees of the University of Illinois; provided, that an award for damages in a case sounding in tort shall not exceed the sum of $2,500.00 to or for the benefit of any claimant. The defense that the State or The Board of Trustees of the University of Illinois is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims.

D. All claims against the State for personal injuries or death arising out of and in the course of the employment of any State employee and all claims against The Board of Trustees of the University of Illinois for personal injuries or death suffered in the course of, and arising out of the employment by The Board of Trustees of the University of Illinois of any employee of the University, the determination of which shall be in accordance with the substantive provisions of the Workmen's Compensation Act or the Workmen's Occupational Diseases Act, as the case may be.

E. All claims for recoupment made by the State of Illinois against any claimant.

Section 9. The Court may:

A. Establish rules for its government and for the regulation of practice therein; appoint coinmissioners to assist the Court in such manner as it directs and discharge them at will; and exercise such powers as are necessary to carry into effect the powers herein granted.

B. Issue subpoenas to require the attendance of witnesses for the purpose of testifying before it, or before any judge of the Court, or before any notary public, or any of its commissioners, and to require the production of any books, records, papers or documents that may be material or relevant as evidence in any matter pending before it. In case any person refuses to comply with any subpoena issued in the name of the

chief justice, or one of the judges, attested by the clerk, with the seal of the Court attached, and served upon the person named therein as a summons at common law is served, the circuit court of the proper county, on application of the clerk of the Court, shall compel obedience by attachment proceedings, as for contempt, as in a case of a disobedience of the requirements of a subpoena from such Court on a refusal to testify therein.

Section 10. The judges, commissioners and the clerk of the Court may administer oaths and affirmations. take acknowledgments of instruments in writing, and give certificates of them.

Section 11. The claimant shall in all cases set forth fully in his petition the claim, the action thereon, if any, on behalf of the State, what persons are owners thereof or interested therein, when and upon what consideration such personc became so interested ; that no assignment or transfer of the claim or any part thereof or interest therein has been made, except as stated in the petition; that the claimant is justly entitled to the amount therein claimed from the State of Illinois, after allowing all just credits; and that claimant believes the facts stated in the petition to be true. The petition shall be verified, as to statements of facts, by the affidavit of the claimant, his agent, or attorney.

Section 12. The Court may direct any claimant to appear, upon reasonable notice, before it or one of its judges or commissioners or before a notary and be examined on oath or affirmation concerning any matter pertaining to his claim. The examination shall be reduced to writing and be filed with the clerk of the Court and remain as a part of the evidence in the case. If any claimant. after being so directed and notified, fails to appear or refuses to testify or answer fully as to any material matter within his knowledge, the Court may order that the case be not heard or determined until he has complied fully with the direction of the Court.

Section' 13. Any judge or commissioner of the Court may sit at any place within the State to take evidence in any case in the Court.

Section 14. Whenever any fraud against the State of Illinois is practiced or attempted by any claimant in the proof, statement, establishment, or allowance of any claim or of any part of any claim, the claim or part thereof shall be forever barred from prosecution in the Court.

Section 15. When a decision is rendered against a claimant. the Court may grant a new trial for any reason which, by the rules

of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

Section 16. Concurrence of two judges is necessary to the decision of any case.

Section **17.** Any final determination against the claimant on any claim prosecuted as provided in this Act shall forever bar any further claim in the Court arising out of the rejected claim.

Section 18. The Court shall file with its clerk a written opinion in each case upon final disposition thereof. All opinions shall be compiled and published annually by the clerk of the Court.

Section 19. The Attorney General, or his assistants under his direction, shall appear for the defense and protection of the interests of the State of Illinois in all cases filed in the Court, and may make claim for recoupment by the State.

Section **20.** At every regular session of the General Assembly, the clerk of the Court shall transmit to the General Assembly a complete statement of all decisions in favor of claimants rendered by the Court during the preceding two years, stating the amounts thereof, the persons in whose favor they mere rendered, and a synopsis of the nature of the claims upon which they were based. At the end of every term of Court, the clerk shall transmit a copy of its decisions to the Governor, to the Attorney General, to the head of the office in which the claim arose, to the State Treasurer, to the Auditor of Public Accounts, and to such other officers as the Court directs.

Section **21.** The Court is authorized to impose, by uniform rules, a fee of **$10.00** for the filing of a petition in any case; and to charge and collect for each certified copy of its opinions a fee of twenty-five cents for five pages or less, thirty-five cents for more than five pages and not more than ten pages, forty-five cents for more than ten pages and not more than twenty pages, and fifty cents for more than twenty pages. All fees and charges so collected shall be forthwith paid into the State Treasury.

Section **22.** 'Every claim cognizable by the Court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless it is filed with the clerk of the Court within two years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues two years from the time the disability ceases.

Section **23.** It is the policy of the General Assembly to make no appropriation to pay any claim against the State, cognizable by the Court, unless an award therefor has been made by the Court.

Section **24.** "An Act to create the Court of Claims and to prescribe its powers and duties," approved June **25, 1917,** as amended, is repealed. All claims pending in the Court of Claims created by the above Act shall be heard and determined by the Court created by this Act in accordance with this Act. All of the records and property of the Court of Claims created by the Act herein repealed shall be turned over as soon as possible to the Court created by this Act.

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CASES ARGUED AND DETERMINED IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

(No. 4119—Claim denied.)

ESTHER APPLEBAUM, Claimant, *vs.* STATE OF ILLINOIS, Respondeat.

Opanion filed July 8, 1949.

MCFARLAND, MORGAN & STEARNS, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM J. COLOHAN, Assistant Attorney General, for Respondent.

NEGLIGENCE—FAILURE TO SHOW—*State not liable for injuries sustained, where evadence fails to show negligence of the State.* Where the complainant sought to recover damages for injuries sustained by running into an automobile (jeep) operated by a member of the Illinois Reserve Militia. Held that the complainant as required under the statute failed to establish by a preponderance of the evidence that she was in the exercise of due care for her own safety and that the State through its officers, agents and employees is guilty of negligence; that the greater weight of the evidence which was sketchy appeared to show that the claimant, stepping out from between two parked cars looked only in one direction, and that her injuries resulted-from failure to exercise reasonable care rather than the negligence of the driver of the (jeep) automobile, and that an award must therefore be denied.

LANSDEN, J.

Esther Applebaum, claimant, filed her complaint on September 13, 1948, seeking an award of $2,500.00 for personal injuries sustained on September 14, 1946. It is alleged that claimant, while attempting to cross from the north to the south side of West Roosevelt Road, Chicago, Illinois, in front of number 729, was struck and injured by a jeep belonging to Company "F", Eighth Infantry, Illinois Reserve Militia, in consequence of the negligent operation of said vehicle by James Franklin,

Jr., a sergeant of the aforesaid unit of the State Reserve Militia.

Sergeant Franklin was served with a subpoena and called as a witness by claimant. He testified that he was travelling in an easterly direction upon Roosevelt Road on September 14, 1946, between the hours of 12 noon and 2:00 P. M. He was proceeding about twenty miles an hour. The accident occurred on Roosevelt Road between Union and Halsted. Union Street is a "T" intersection south from Roosevelt and ends on the north. Roosevelt Road is about thirty-five feet wide. Traffic was heavy; cars were lined up on both sides and the west bound traffic was blocked. As he reached a point alongside the safety island, a woman, whom he identified as claimant, ran into the left side of his jeep near the driver's seat. He first saw her when she came out from between the cars and ran at a "trot" across the street just as the front end of the jeep passed her.

At the time she was struck he was travelling in high gear at about twenty miles per hour. He came to a stop and went into a store to phone for assistance. Bugle Sergeant Elmer Johnson of Company B, 8th Illinois Reserve Militia, was a passenger in his jeep. Claimant was taken from the scene of the accident to a hospital. He knew that large numbers of pedestrians customarily cross the street at the place of the accident because there is no other place for pedestrians to cross. There were no stop signs at that point.

On cross-examination Sgt. Franklin stated that he was returning to the 8th Reg. Armory after having been instructed to inquire about some pies which had been ordered by the Regiment to be taken on a camping trip. Claimant stepped from the north side of the street which was to the left of the jeep, from between a line of station-

ary cars lined up all the way to the point of the accident.

Claimant testified that she had left the store in which she was employed at 669 West Roosevelt Road, on the southeast corner of Roosevelt and Union. She then went across the street to a cafeteria on the north side of the street. She, walked east to a point opposite the west end of a safety island on the opposite side of the street. She looked eastward and then proceeded to cross until she reached the west bound street car tracks. The last thing she remembered was looking east for her "safety." She was struck at a point slightly north of the north rail of the east bound street car tracks. She was knocked unconscious and did not regain consciousness until 7:30 that evening at the Garfield Park Hospital. She stayed there ten days and was removed to Michael Reese Hospital and remained there about six weeks. At the time of the accident she was treated by Dr. Rosen and was still under the care of Dr. Philip Lewin at the time of the hearing. "All" her ribs were broken and she had a concussion. She still experiences pain in her side. Her doctor's bills were about $900.00, and her hospital and nursing expense about $700.00 or $800.00.

No departmental report was filed.

This complaint invokes Sec. 8 (c) of the Court of Claims Law which vests this Court with jurisdiction to determine claims against the State for damages in cases sounding in tort. It is, of course, essential to a recovery under this provision of the statute that ,claimant establish by a preponderance of the evidence that she was in the exercise of due care for her own safety and that the State, by and through its officers, agents and employees is guilty of negligence which proximately caused claimant's injuries. This she has failed to do.

The proof in this case is meagre, vague and insuffi-

cient. It is not possible for this Court to gather the facts. and circumstances surrounding the occurrence in question from this record sufficiently to say with any degree of certainty who, if any one, was at fault. The inferences, if any, that may be drawn from this sketchy proof favor respondent rather than claimant. The greater weight of the testimony appears to show that claimant stepped out from between two parked cars; that she looked only in one direction, easterly and did not look in any other direction until she struck the left front side of the jeep which was travelling from a westerly direction. This would warrant a finding that claimant was guilty of contributory negligence and that her injuries resulted from her failure to exercise reasonable care for her own safety rather than the negligence of Sgt. Johnson. Any conclusion to the contrary would be based on conjecture.

The Court is of the opinion that if claimant had looked she would have seen the approaching jeep and that she cannot now be heard to say that she looked and did not see, when if she had looked she would have seen. Claimant's conduct from the record shows an absence of due care and caution for her own safety, and an award must therefore be and the same is hereby denied.

(No. 4144—Claimant awarded $5,200.00.)

MARY L. SCHEUER, WIDOW, ET AL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 8, 1949.

FRANCIS T. DUNCAN AND CHARLES W. HELMIG, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM J. COLOHAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when* employee dies leaving dependents, Section 7 (e) of the Act *as* inoperative as *to* funeral expenses. Where employee of State Highway Department who received fatal injuries, when leaving maintenance truck to remove obstacles from the highway, by being hit by an automobile, his widow was entitled *to* a total award of $5,200.00 under the Act but was not entitled to funeral expenses under Section 7 (e) thereof.

LANSDEN, **J.**

Claimant, Mary L. Scheuer, is the widow of Theodore Scheuer, deceased, who was formerly employed by the Department of Public Works and Buildings, Division of Highways, of the State of Illincis. Claimant, as widow, seeks an award for the death of her husband under the provisions of the Workmen's Compensation Act.

There is no dispute whatsoever as to the facts involved in this case. A stipulation of the respective parties, proof offered on behalf of claimant, and the departmental report filed herein present with corroboration and without contradiction all of the facts required for the determination of this case.

On the morning of September 30, 1948, decedent and his supervisor, John Kellerman, who was driving, was transporting a truckload of stone chips, to be used in road maintenance work, proceeding west on U. S. Highway No. 6 from Ottawa, Illinois, en route to Utica, Illinois. Approximately two miles west of Ottawa they noticed two pieces of old furnace pipe lying on the bridge and Mr. Kellerman stopped the truck in the westbound traffic lane to allow decedent to remove this traffic hazard. Decedent alighted from the truck, stepped around behind the truck and then stepped into the eastbound traffic lane, where he was immediately struck by an automobile owned and driven by Mr. Robert Manahan of Cherry, Illinois. Decedent's injuries included fractures to both

legs, brain injury, fracture of the skull, and multiple contusions over his entire body.

Decedent was immediately taken to Ryburn Memorial Hospital at Ottawa and was given medical treatment by two doctors, but decedent died about four hours. after. being injured.

It is conceded that at the time of the accident, decedent and respondent were operating under the Workmen's Compensation Act, and notice of the accident, claim for compensation and application therefor were all given or made within the time provided by said Act. It is also conceded that the accident arose out of and in the course of decedent's employment. An award is, therefore, indicated.

The earnings of decedent, exclusive of overtime, in the year preceding his death totalled $1,705.50. He was a man approximately seventy-two years of age at the time of the accident and his death, and he had no children under the age of sixteen years, and was survived by his wife, the claimant herein, who lived with and was dependent upon him for support.

All medical, hospital and nursing services resulting from the fatal injuries to Theodore Scheuer have been paid by respondent.

Claimant introduced in evidence, without objection, a funeral bill amounting to $425.00 apparently on the theory that respondent should be made to pay some part or all thereof. Section 7(e) of the Workmen's Compensation Act relating in part to burial expenses is inoperative so long as an employee dies leaving dependents. In this case there can be no award for funeral expenses even up to the prescribed maximum of $150.00.

Generose Schweickert, 1801½ Fourth Street, Peru, Illinois, was employed to take and transcribe the evi-

dence before Commissioner Young. Charges in the amount of $30.00 were incurred for such services, which charges are fair, reasonable and customary.

An award is entered in favor of Generose Schweickert in the amount of $30.00, payable forthwith.

An award is entered in favor of Mary L. Scheuer, widow of Theodore Scheuer, deceased, in the amount of $5,200.00, to be paid to her as follows:

$ 780.00, which has accrued and is payable forthwith;
4,420.00, which is payable in weekly installments of $19.50 per week, beginning on the 15th day of July, 1949, for a period of 226 weeks, with an additional final payment of $13.00.

All future payments being subject to the terms and conditions of the Workmen's Compensation Act, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor, as provided in Section 3, "An Act concerning the payment of compensation awarded to State employees."

(No. 4153—Claimant awarded $1,365.00.)

ELI AESCHLEMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed July 8, **1949.***

HAROLD A. BUTTERS, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM J. COLOHAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when loss of first distal phalange and approximately three fourths of the next proximal phalange will be considered as loss of entire thumb under the Act.* Where an employee employed by the State as maintenance man at Buffalo Rock State Park while using a power lawn mower, and whose thumb accidentally came in contact with the revolving blades resulting in the loss of the first distal phalange and approximately three fourths of the next proximal

phalange of his thumb, such injury will be considered loss of the entire thumb and he is entitled to an award therefor under the Act.

LANSDEN, J.

Claimant, Eli Aeschleman, seeks to recover under tlie provisions of the Workmen's Compensation Act for the loss of his right thumb as a result of an accident arising out of and in the course of his employment in the Department of Public Works and Buildings, Division 'of Parks and Memorials.

On May 14, 1948, claimant, employed by respondent as a maintenance man, was mowing the lawn at Buffalo Rock State Park, LaSalle County, Illinois, Upon his return from lunch, he cranked the motor of the power lawnmower he was using in the course of his regular duties and to avoid flooding the carburetor of the engine, rushed around the machine to make the proper adjustment. In his haste, claimant's thumb accidentally came in contact with the revolving motor fan blades and his thumb was traumatically severed resulting in the loss of the first distal phalange and approximately three-fourths of the next proximal phalange.

Immediate notice of the accident was given, and respondent has furnished and paid all of the medical and hospital expenses resulting from claimant's injury.

No question has been raised by respondent as to the compliance by claimant with all the jurisdictional requirements of the Workmen's Compensation Act; and from the record in this case all such requirements have apparently been complied with.

At the time of the accident, claimant was sixty-five years of age, and had no children under the age of sixteen years, and the earnings of claimant during the year immediately preceding his injury amounted to $2,536.00.

Claimant in his complaint erroneously set forth the

sections of the Workmen's Compensation Act under which he deemed himself entitled to an award, but Commissioner Young has recommended to the Court that this apparent oversight on the part of claimant be disregarded. Furthermore, claimant in his brief filed herein, has referred to the correct sections of the Workmen's Compensation Act. Therefore, this Court feels that to rest on such a technicality would not be in keeping with the liberalities allowed litigants in modern practice.

The liability for injuries to fingers has been but little passed upon by the courts in Illinois. In *McMorran & Co.* v. *Ind. Corn.,* 290 Ill. 569, it was held that the loss of one-sixteenth of an inch off the end of the bone is not a loss of the first phalange. This Court in *Sieloff* v. *Xtate,* 9 C.C.R. 494, held that a loss of three-sixteenths of an inch of the first phalange was not the loss of such phalange. However, in *Macon. County Coal Co.* v. *Ind. Com.,* 367 Ill. 458, the court held that the loss of three-eighths of an inch of the first phalange was the loss of such phalange. In Angerstein, "The Employer and The Workmen's Compensation Act of Illinois" Section 304, the writer expresses the view that the loss of more than a third of the phalange would be considered the loss of such phalange. See also 18 A.L.R. 1354-1358.

In view of the above authorities, we hold that claimant has lost his entire thumb and that his injury is specifically covered by Section 8 (e)(1)(7) of the Workmen's Compensation Act which directs that a loss of more than one phalange be considered as the loss of an entire thumb. An award in favor of claimant is therefore manifest.

Margaret Mohler, Ottawa, Illinois, was employed to take and transcribe the evidence before Commissioner Young. Charges in the amount of $10.00 were incurred

for such services, and the same is fair, reasonable and customary.

An award is entered in favor of Margaret Mohler in the amount of $10.00, payable forthwith.

An award is entered in favor of claimant, Eli Aeschleman, in the amount of $1,365.00, being at the rate of $19.50 per week for seventy weeks, to be paid to him as follows:

$1,170.00, which has accrued and is payable forthwith;
195.00, which is payable in weekly installments of $19.50 a week, beginning on the 15th day of July, 1949, for a period of 10 weeks.

This award is subject to the approval of the Governor, as provided in Section 3 "An Act concerning the payments of compensation awarded to State employees."

(No. 4163—Claimant awarded $698.33.)

ED WITT, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed July 8, 1949.

ED WITT, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where employee lost two phalanges from the right index finger, allowance for entire finger will be made under.* Where claimant was engaged in operating power driven mower and mower bar struck an obstruction causing it to fold back and in attempting to pull bar into place the sickle moved catching and severing the right index finger of claimant one quarter inch distal to the knuckle joint, requiring amputation at the knuckle joint and the loss of the middle and terminal phalanges of the right index finger, he is entitled to recovery for loss of entire finger under the Act.

SCHUMAN, C. J.

Claimant, Ed Witt, filed complaint pro se. Claimant, Ed Witt, was employed by the State of Illinois, Depart-

ment of Public Works and Buildings, Division of Highways, on April 6, 1942 as a common laborer.

On October 20, 1948, the claimant was engaged in mowing vegetation with a power driven mower on S.B.I. Route 4 in Champaign County. While engaged in said work, the mower bar struck an obstruction and caused the mower bar to fold back toward the machine. Claimant attempted to pull the bar into place, the sickle moved, catching and severing his right index finger one-quarter inch distal to the knuckle joint.

Claimant was taken to Dr. H. C. Bowser in Sidney, who sent him to the Burnham City Hospital in Champaign. The finger was amputated at the knuckle joint. The claimant lost the middle and terminal phalanges of right index finger.

The Division of Highways report and the complaint filed by the claimant show that the Division of Highways had immediate notice of the accident and that the claim was filed in conformity with and in time under the terms and provisions of the Workmen's Compensation Act.

The evidence shows that at the time of the accident, the claimant was receiving $180.00 a month, and while it is not shown that these were actual earnings for a year immediately preceding the accident, it is presumed that such is the fact.

From the evidence, the claimant would be entitled to temporary total disability from October 21, 1948 to November 18,1948. However, not more than 30 days having been lost as a result of said injury, his compensation would not start until after the 8th day from said injury, which would be on October 28, 1948. Claimant would therefore be entitled to compensation for 13 days or 1 6/7 weeks for temporary disability or an amount of $36.21.

After having lost two phalanges from the right index finger, he would be entitled to a loss of a whole finger which is 40 weeks at $19.50 or a total amount of $780.00.

An award is therefore entered in the amount of $816.21. The evidence shows that during the period of temporary disability, the claimant was paid the sum of $117.88, or his full salary. From the total award should be deducted the sum of $117.88, representing an overpayment of money paid by respondent to claimant for temporary total compensation, leaving a balance of $698.33 for which an award is hereby entered in favor of claimant. All of this amount has accrued and is payable forthwith.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4092—Claimant awarded $2,500.00.)

HENRY G. WARD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 23, 1949.

WILLIAM G. JUERGENS, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S OCCUPATIONAL DISEASES ACT—*where allowance will be made under the Act.* Where employee of Chester Security Hospital, assigned to occupational therapy room, was instructor in crafts of various kinds, and inmates were engaged in renovating moss used in mattresses, and some of the patients were found to be suffering from tuberculosis, and the empboyee contracted pulmonary tuberculosis in consequence of his employment, it was held that the State was negligent under Section 3 of the Act and that he was entitled to recovery thereunder.

HEALTH AND SAFETY ACT (Illinois Revised Statutes, 1947, Chapter 48, Paragraph 137.3) makes it the duty of every employer *to* provide

reasonable protection for the lives, health and safety of all persons employed, and violation of any Statute intended for the protection of the health of employees shall constitute negligence of the employer.

DELANEY, J.

This claim is brought under Section 3 of the Work-

claimant, for damages sustained as a result of contracting tuberculosis during the course of his employment by the above named respondent.

The evidence discloses that he was employed at the Illinois Security Hospital at Chester, Illinois; that he was assigned to occupational therapy room, and in the course of his employment he was an instructor of the inmates in crafts of various kinds. This work included assignments at different times in the mending room where the inmates were engaged in renovating moss used in mattresses. This moss had been used in other mattresses and was cleaned by spreading it on the ground and spraying it with a hose, and after this spraying it was re-used. Some of the patients under Mr. Ward's supervision were later found to have been suffering from tuberculosis, of an infectuous nature. In the cleaning or renovating of this moss, large amounts of dust and lint filled the room. The evidence shows that the claimant worked in this institution from October 18, 1941, to October 5, 1947, at which time he resigned. That subsequently, on January 6, 1948, he was reinstated and assigned to work at the Elgin State Hospital where he reported for work on January 14, 1948, and upon examination and after X-ray pictures were taken, he was advised that he was suffering from active pulmonary tuberculosis, and because of this condition was not permitted to work. The evidence shows that prior to claimant being employed in the Illinois Security Hospital at Chester,

Illinois, he was not suffering from tuberculosis nor was any member of his family., That subsequent to being refused employment he was ordered confined to bed for a period of approximately seven months until August I, 1948, when against his doctor's orders he obtained employment as a temporary clerk on a draft board, which employment ceased October 15, 1948.

Dr. E. Ralph May, the physician at the Illinois Security Hospital, and also the claimant's physician, testified that he had taken four men out of Mr. Ward's department who were suffering from tuberculosis. Dr. May further testified as follows:

Q. "Doctor, was he exposed to active tubercular patients?

A. "He was, four of them.

Q. "State whether or not, in your opinion, there was a direct causal connection between the occupation that Ward was engaged in at the Illinois Security Hospital, whereby he came in contact with and had to supervise active tubercular patients in the occupational therapy room where dust and lint was being scattered about, and the subsequent condition he is in, which is active pulmonary tuberculosis.

A. "Yes. The quarters those men were in was a pre-disposing cause. The direct cause was the fact that we took four active tubercular patients out of there.

Q. "Tell me whether or not in your opinion the tuberculosis from which Henry Ward is now suffering had its origin in his employment considering the fact that he was confined with and locked in the room with active tubercular patients, where dust and lint was constantly flying?

A. "I would say so, because in 1941 he was accepted for the employment for the State, his physical record was negative; in 1942 it was negative; in 1945 it was positive and is still positive.

Q. "Doctor, tell whether or not, in your opinion, the disease is traceable to the hazards of the employment with the State of Illinois in the Illinois Security Hospital in the physical therapy room in a room where he was confined with active tubercular patients?

A. "Yes."

The Health and Safety Act (Illinois Revised Statutes, 1947, Chapter 48, Paragraph 137.3) makes it the duty of every employer to provide reasonable protection for the lives, health and safety of all persons employed, to effectuate its purpose. In *Wheeler* vs. *State*, 12 C.C.R. **254,** we held that the State of Illinois may properly be made respondents in the Court of Claims in any action for damages for injury to health resulting from a disease contracted by a State employee in the course of his employment, and proximately caused by the State's negligence, under the terms and provisions of the Workmen's Occupational Diseases Act. The State not having elected to provide and pay compensation under Section 4 of the Workmen's Occupational Diseases Act, the employee has a right of action under Section 3 of the Act. That section provides that violation by an employer of any Statute of this State, intended for the protection of the health of employees, shall constitute negligence of the employer within the meaning of the Section.

The Rules adopted by the Department were intended to promote the health of the claimant and to prevent the spreading of contagious or infectuous diseases, including open tuberculosis, and should have been followed by the officials in charge of the institution, not only for the benefit of its employees such as claimant, but also for the unfortunate inmates of the ward.

Respondent was negligent under Section **3** of the Workmen's Occupational Diseases Act and, therefore, an award for damages is justified.

While the claimant was employed, he received a salary of $2,640.00 per year. He is suffering now from chronic pulmonary tuberculosis, bilateral, more marked on the right lung. He does not seem to be improving

and will have to remain confined to a bed until his tuberculosis condition becomes arrested. The length of time required is uncertain. The Court is of the opinion that claimant is entitled to damages under Section 3 of the Workmen's Occupational Diseases Act in the sum of $2,500.00.

An award is, therefore, entered accordingly.

Lucille McGuire, Court Reporter, was employed to take and transcribe the evidence in this case and has rendered a statement for service in the amount of $10.20. The Court finds that the amount charged is fair, reasonable and customary in the community where it was rendered and said claim is allowed and payable forthwith.

(No. 4139—Claimant awarded $6,094.11 and Life Pension.)

GEORGE W. LAWSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 23, 1949.

J. CLINTON SEARLE, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where* allowance *will be made under.* Where an employee of State Division of Highways was operating a motor grader, and the gas fumes emanating therefrom blew in the operator's face, and a bulldozer, hooked to motor grader to prevent it from toppling over on a slope, hitting a fence threw the operator, claimant, against the interior of the cab of the motor grader injuring the claimant causing acute ooronary insufficiency with myocardial infraction posterior type, and his condition will restrict his physical activities permanently, it was held that he was totally and permanently disabled and entitled to recover therefor under the Act. Citing Fittro vs. Industrial Commission, 377 Ill. 532, and Joliet vs. Industrial Commission, 291 Ill. 555.

SCHUMAN, C. J.

The stipulation of facts disclose that claimant, George W. Lawson, at the time of his alleged claim on

May 25, 1948, was 51 years of age and had two minor children under the age of 16 years; that he was employed by the State of Illinois since April 1, 1941 and that his earnings the year immediate to May 25, 1948 were $2,-413.32; that he was paid full salary of $203 per month until June 22, 1948, inclusive, and compensation at the rate of $20.80 a week from June 23, 1948 until September 14, 1948, inclusive; that during his second period of disability he was paid full salary beginning November 16, 1948 through November 25, 1948, and compensation of $20.80 November 30th, 1948; and total payments received by claimant for wages and compensation were $520.29.

That respondent had due notice of the accident, claim for compensation was made and filed within the time required by law.

The facts further disclose that claimant was a Highway Section Foreman employed by the Department of Public Works and Buildings, Division of Highways; that on May 25, 1948 he was operating a motor grader, a mile and a half north of Viola, Illinois, on Route 67; that he started to operate it at 11 A. M. until noon, that gas fumes emanating from the grader blew in his face; that at 1:00 P. M. a bulldozer was hooked in front of the grader to give the grader more power and to prevent it from tipping over; that grader was operated on a slope at a 45° angle and claimant inhaled gas fumes about 2½ hours; that the bulldozer hit a fence and threw claimant violently against the interior of the cab of the grader; that claimant hit his shoulder,. back and head against the cab; that claimant got up and took hold of steering wheel and became dizzy and was sick; that he tried several times to again operate the grader, but could not and was ordered taken home at 4 o'clock in the afternoon.

That when claimant got home, Dr. James V. Hastings was called and claimant was kept in bed until June 30th; that electrocardiographs were taken on May 27th, 1948 at the Lutheran Hospital in Moline, and these showed acute coronary insufficiency with myocardial infraction posterior type moderately recent; that when Dr. Hastings examined claimant on May 25, 1948 his general symptoms suggested a coronary attack; that four cardiographs were taken and substantiated Dr. Hastings' examination and showed coronary thrombosis and that his condition will restrict his physical actions permanently; that claimant has an impaired circulation of the heart muscle and that the condition is permanent; that the condition was caused by the facts showed in evidence with reference to his work on May 25th, 1948, being over exertion and inhaling of gas fumes; and that claimant was totally and permanently disabled from pursuing gainful employment.

The facts show claimant was engaged in work he was not doing every day and placed additional exertion and brought on the attack.

The facts further show claimant had never suffered from a heart attack before, and before going to work for the State passed a physical examination; that after the attack he tried to resume his supervisory work, but could not perform said work; that he had a common grade school education, going to work at the age of 14 and had no training of any kind, but for hard labor; and that he tried to get work, but was not able; and had always worked and was never out of a job until the attack on May 25, 1948.

From the undisputed facts in this record, the claimant received a coronary attack that arose out of and in the course of his employment and that he is totally and

permanently disabled from pursuing any gainful occupation.

In the opinion of the court this case falls within the holding of the Supreme Court of Illinois in the cases of *Fittro* vs. *Industrial Commission,* **377** Ill. **532,** and *Joliet* vs. *Industrial Commission,* 291 Ill. 555.

That all medical and hospital expenses have been paid by the respondent and there are no further claims made for said expenses.

The testimony on hearing before Commissioner Young was transcribed by Laura Campbell, who has submitted a statement of $25.00 for her services. This charge is reasonable and proper.

The claimant is therefore entitled to an award of $6,240.00, less the sum of $145.89 paid claimant for non-productive time, or the sum of $6,094.11.

An award is therefore entered in favor of the claimant, George W. Lawson, in the amount of $6,094.11, payable as follows:

$ 727.71, being 42 weeks at $20.80 **per** week, less overpayment of $145.89 for non-productive time. which has accrued and **is** payable forthwith;

$5,366.40, to be paid in weekly installments of $20.80 per week, beginning September 28, 1949 for a period of 258 weeks; And, thereafter a pension for life in the sum of $499.20 annually, payable in monthly installments of $41.60.

Future payments being subject to the terms and provisions of the Workmen's Compensation Act of Illinois, the jurisdiction of this cause is specifically reserved for the entry of such other further orders as from time to time may be necessary.

This award is subject to the approval of the Governor as provided in Section **3** of "An Act concerning the payment of compensation awards to .State Employees. --

(No. 4145—Claimant awarded $285.50.)

HANNAH GREENWALD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 23, 1949.

HENRY J. SAMUEL, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM J. COLOHAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where allowance will be made under.* Where employee of State Division of Unemployment Compensation slipped on the waxed floor of her place of employment and sustained a sprained right wrist and injury to her knee, she was entitled to recover for temporary total disability for six (6) weeks $117.00 and $168.50 medical and doctor's expenses, under the Act.

DELANEY, J.

Claimant, Hannah Greenwald, was employed on April 26, 1948, in the capacity of a claim taker by respondent in the Department of Labor, Division of Unemployment Compensation. On that day, claimant slipped on a waxed floor at her place of employment in Chicago; claimant sustained a sprained right wrist and injury to her knee.

The record consists of the complaint, departmental report, stipulation, waiver of brief of claimant, and waiver of brief of respondent.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act and the accident in question arose out of and in the course of the employment.

Claimant paid the South Chicago Community Hospital $5.00 for X-rays, $160.00 to Dr. Jacob Samuel for professional services, and $3.50 for medicines. She was temporarily and totally disabled from April 26, 1948, to June 7,1948. The respondent has not reimbursed her for her medical expenses nor has it paid any compensation for the temporary period of her total disability.

Records show that claimant's salary was $160.00 per month. She was 53 years of age and had no children under 16 years.

We conclude, therefore, that the claimant is entitled to an award for her medical and doctor bills in the amount of $168.50, and also an award of $117.00 for 6 weeks temporary total disability. The injury having occurred after July 1, 1947, this must be increased 30% making her compensation rate the maximum of $19.50 per week, all of which has accrued, payable forthwith.

The testimony on the hearing before Commissioner Blumenthal was taken by A. M. Rothbart, who has submitted a statement for $11.10 for his services. This charge is reasonable and proper.

An award is made in favor of A. M. Rothbart for stenographic and reporting services in the amount of $11.10, which is payable forthwith.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of awards to State employees."

(No. 4147—Claim denied.)

WILLIAM F. GIBBS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

***Opinion** filed September 23, 1949.*

WILLIAM F. GIBBS, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—*where claim will be denied.* Where the claimant was driving his automobile in daylight on U. S. Route 36, through a torrential rain, and his automobile hit the rear of another which had stopped at a barricade to allow other cars to pass, resulting in damage to claimant's automobile, it was held that he failed to establish the elements necessary to recovery, namely:

(1) that claimant was in the exercise of due care and caution for the safety of his automobile;

(2) that the State of Illinois was negligent as charged in the complaint; and that the negligence of the State of Illinois was the proximate cause of the injury and damages to the automobile of the claimant.

(3) that claimant sustained damages.

PROXIMATE CAUSE—Signs on barricade were sufficient under normal circumstances, and accident was due to poor visibility caused by torrential rain.

SCHUMAN, C. J.

The facts show that on June 25th, 1948, William Gibbs was driving his 1948 Buick Automobile west on U. S. Route 36, a short distance from the Village of Curran in Sangamon County, Illinois; that it was around 5:30 in the afternoon and daylight; that claimant was driving 35 miles per hour.

The sworn complaint alleges that two cars had stopped at the barricade and that a torrential rain was falling rendering visibility very poor.

The departmental report showed that barricades were placed east of the excavation in question; that east of the barricade pavement alignment was straight a distance of 1172 feet and then follows a 6" degree curve to the left for a distance of 440.3 feet.

The undisputed evidence shows that a torrential rain was falling, and visibility was poor; that two cars had stopped at the barricade to wait for oncoming traffic and that claimant struck the last stopped car; that claimant came upon the Cadillac immediately after rounding the curve.

Claimant testified the Cadillac stopped suddenly. However, the record shows a straight highway for a distance of 1172 feet.

In order for claimant to recover he must prove three distinct elements, namely:

(1) that claimant was in the exercise of due care and caution for the safety of his automobile;

the State of Illinois was the proximate cause of the injury and damages to the automobile of claimant;

(3) that claimant sustained damages.

The claimant alleges there were no warning signs east of the barricade, or if signs were in place, they were so located as to be valueless.

The only evidence in the record as to signs is that barricades were placed east of first excavation. It is apparent that under normal circumstances this would have been sufficient. Claimant was driving in a torrential rain with visibility poor and it is apparent the lack of signs was not the proximate cause of the accident. Two cars had stopped at the barricade. There was 1172 feet of clear road after rounding curve, and it is apparent due to poor visibility claimant did not see the stopped Cadillac due to said visibility.

The claimant having failed to prove any negligence on the part of the State of Illinois that was the proximate cause of the accident his claim will be denied.

(No. 4151—Claimant awarded **$1,934.17.**)

LEE CONNAWAY, Claimant, *vs.* STATE OF ILLINOIS, *Respondent.*

Opinion filed September 23, 1949.

PRANK H. WALKER, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where award will be made under.*

laborer, in the process of cutting wood with an electric saw suffered the loss of portion of his thumb which injury occurred in the course of his employment, and infection set in affecting his entire left arm and reducing the use of same permanently 50%, he is entitled to recovery under the Act.

DELANEY, J.

Claimant, Lee Connaway, was employed on June 10, 1948, by respondent as a laborer with the Department of Conservation at the State Game Farm at Mt. Vernon, Illinois. Mr. Connaway was doing work assigned to him by his superior and was in the process of cutting a piece of wood on an electric saw when he suffered the loss of a portion of his thumb that was cut off by the blade of the saw.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment.

Claimant testified that he was first attended by Dr. Thompson in Mt. Vernon, and Dr. Thompson dressed the thumb every day. A short time later claimant went to Dr. Fairshter of Mt. Vernon because his thumb continued to pain, and Dr. Fairshter amputated it to the middle joint with a rounding off of part of the phalanx. The thumb became infected, and this infection mas eventually cured. Claimant submitted to an examination by Dr. A. W. Modert at the Jefferson Memorial Hospital. Dr. Modert testified before the Commissioner of this Court at a hearing as follows:

Q. "With respect to Mr. Connaway's left hand, thumb and arm, what did you find.

A. "Well, on examination the left thumb has been amputated at, the middle joint with a rounding off of part of the phalanx—proximal—of the left thumb, the distal end to make it clear. It is the distal end of the phalanx, and on examination there has been a great amount of atrophy of the remaining part of the thumb. Over the end of the thumb where the amputation

was it is very fixed and a scar tissue that binds the end of the thumb to the bone at several points, nerves, tender spots on the end of the thumb. There is also very noticed atrophy between the base of the left thumb and the forefinger on the left hand. These are the thenar muscles. The base of the thumb is practically fixed. In other words there is no motion at the base or limited. However, you are able to move it some. There is considerable restriction to the movement of the left forefinger in the middle joint and at the base of the left forefinger. There is some loss of motion in the third, fourth and fifth fingers of the left hand; considerable restriction in the palm and surface of the left hand. There is considerable loss of flexibility of the left wrist. However the dorsal extension is about normal, very little change noticed in the left elbow. The left shoulder on lateral extension of the arm actively is unable to extend the arm over 45 degrees due to the restriction in the shoulder. Passively not able to raise the arm under pressure, and you see that the shoulder blade is moving rather than the bone. The left girdle shoulder muscles are slightly atrophied as compared with the right. Forward and backward motions of the left arm at the shoulder are slightly restricted, but then nothing to compare with the lateral elevation of the left arm at the shoulder; the whole picture as I see it represents that there must have been a rather terrific infection in the left thumb itself. I think that covers it.

Q. Now Doctor on this infected thumb, in your opinion does the injury to the hand and the rest of the arm, could that be a direct cause of the infected thumb.

A. "Yes, it generally is. I didn't see the infection and don't know the extent of it, but they will cause a restricted shoulder and wrist and atrophy of the muscles and so on.

Q. "Would you recommend or prescribe any treatment.

A. "Nothing except the thumb, if it gives too much pain it should be reamputated and the nerves treated as treated for an amputation and more padding put over the end of the bone. That all depends upon how much is evidenced. He does have trouble, but I wouldn't recommend it unless the patient says it is giving so much trouble, then it should be done. The shoulder should be worked on. It is becoming fixed and will gradually increase. That will happen after lots of infection.

Q. "What per cent of use of the hand and arm would you say he has now.

A. "That is very difficult to say—of course as far as the thumb, he has very little use of the thumb, possibly a good 20% loss of the left forefinger.

Q. "What per cent *of* the thumb.

A. "The way the thumb is now, **100%** in the thumb unless something is done with it, and the left hand is about 25% at least of the left hand. Now as to the shoulder, you are running into a different proposition. I would say all of this is due to the injury. You have about 33⅓% loss of use of the left arm.

Q. "What would you say the ultimate per'cent of loss of use the arm and shoulder will be if something isn't done.

A. "It shouldn't exceed **50%.**

Q. **"A** total of **50%** is as far as it would ever be.

A. "Yes."

The evidence discloses that claimant sustained a permanent partial loss of use of his left arm. The medical testimony on behalf of claimant that the ultimate per cent of loss of use of the left arm will not exceed 50% is not impeached and stands without contradiction. Due to the fact that the thumb, left forefinger and left hand are all considered integral parts of the left arm, the value of the compensation rate is computed on a basis of injury to the left arm.

Claimant's annual average wage was $2,100.00, making his legal compensation $40.38. His compensation rate, would therefore be the maximum of $15.00; since the injury occurred subsequent to July 1,1947, this must be increased 30%, making a compensation rate of $19.50 per week. Claimant is thus entitled to an award of 112½ weeks at $19.50 per week, or $2,193.75. Claimant, however, was paid his regular wage of $40.38 per week during a period of forty-five days for non-productive time in the amount of $259.58. This sum must be deducted from his award.

An award is therefore entered in favor of claimant, Lee Connaway, in the sum of $1,934.17, payable as follows:

$1,046.92, which has accrued and is payable forthwith.

$ **887.25,** payable in **45** weekly installments of **$19.50** beginning September **30, 1949,** with a final payment **of $9.75.**

as provided under the provisions of Section 8 (e) of the Workmen's Compensation Act, as amended.

Ruth R. Clark, Court Reporter, was employed to take the transcript of the testimony for which she made a charge of $26.39. We find that this charge is fair, reasonable and customary.

An award is, therefore, entered in favor of Ruth R. Clark in the sum of $26.39, payable forthwith.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4161—Claimant awarded $286.57.)

LUCY M. O'DONNELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 23, 1949.

LUCY M. O'DONNELL, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; WILLIAM J. COLOHAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where award will be made under.* Where an employee of the State Department of Public Welfare, Division of Child Welfare, while investigating cases, and in the course of her employment, slipped and fell on ice resulting in injuries to her back, and because she did not respond to treatment and was advised by her physician to *go* to Florida for the benefits of warmth and sunshine and was absent from her employment for 8 2/7 weeks, held that she was entitled under the Act to temporary total disability for that period and for medical services and drugs prescribed.

LANSDEN, J.

Claimant, Lucy M. O'Donnell, seeks to recover under the provisions of the Workmen's Compensation Act for 8-2/7 weeks of temporary total disability as a result of a fall on ice in the performance of her duties as a child welfare worker in the Department of 'Public Welfare, Division of Child Welfare.

On the day the accident occurred, claimant was investigating at various homes cases assigned to her, and there can be no question from the record but that her injuries to her back resulted from an accident arising out of and in the course of her employment. Because of a pre-existing arthritis, claimant during the winter of 1948 did not respond to the treatment of her attending physician, Dr. William E. Guinea, who recommended to her that she go to Florida to obtain the benefits of warmth and sunshine. This claimant did, and it is for the period of time that she was absent from her employment, on her doctor's recommendation, that she seeks recovery for temporary total disability.

Claimant was paid her full rate of pay for two weeks' vacation and sick leave, and strictly speaking, she might be entitled to a greater allowance for temporary total disability than she claims in her complaint, but she testified directly at the hearing before Commissioner Young that all she was claiming was 8-2/7 weeks of temporary total disability compensation. Under such circumstances, we do not feel free to enlarge her recovery.

The evidence also shows that claimant paid Dr. Guinea the sum of $75.00 for his professional services and expended the further sum of $50.00 for drugs prescribed in the course of her treatment. Such expenditures were reasonable and claimant is entitled to recovery for them.

A. M. Rothbart, 120 South LaSalle Street, Chicago, Illinois, was employed to take and transcribe the evidence before Commissioner Young. Charges in the amount of **$45.30** were incurred for such services, which charges are fair, reasonable and customary. An award is therefore entered in favor of A. M. Rothbart for such sum.

Claimant's rate of pay was such as to entitle her to

the maximum amount per week under the Workmen's Compensation Act, and she had no persons dependent upon her for support.

An award is entered in favor of claimant, Lucy M. O'Donnell in the sum of $286.57, all of which is accrued and payable forthwith, and is made up as follows:

8 2/7 weeks at $19.50 per week, or $161.57 and a further sum of $125.00 for doctor's professional services and drugs.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4178—Claimant awarded $5,200.00.)

MARY FRANCES MOODY, WIDOW, ET AL., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

***Opinion** filed September 23, 1949.*

MARY FRANCES MOODY, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where award will be made under.* Where a State Highway patrolman, while detailed to weighing of trucks, and driving a police car, was hit by a freight train and sustained fatal injuries, the claimant, his widow, was entitled to recover under the Act.

DELANEY, J.

Claimant, Mary Frances Moody, is the widow of Roy Kyle Moody, deceased, who was employed on February 28,1949, as a state highway patrolman in the Department of Public Safety. On that day at approximately 10:00 A. M., while detailed to weighing trucks at the Cargill Soy Bean Mill located near the intersection of Sangamon Avenue and Illinois Terminal Railroad 'Tracks in the City of Springfield, Illinois, his police car was struck

by an Illinois .Terminal Freight Train. Mr. Moody died at approximately 12:15 P.M. on the same day.

The record consists of the complaint, departmental report and brief and argument of respondent.

Said report is in words and figures as follows:

"On February **28, 1949,** the date this cause of action arose, Mr. Roy Kyle Moody resided with his wife, Mary Frances Moody, at **311** W. Lawrence Avenue, Springfield, Sangamon County, Illinois. He was 55 years of age, but had no children under **16** years of age dependent upon.. him for support.

"Mr. Roy Kyle Moody was first employed by the Department **of** Public Works and Buildings, Division of State Police on July **2, 1930,** as an automobile mechanic at a salary of **$125.00** a month. He continued in this same classification and at the same salary rate until December **1, 1931,** when he resigned to take other employment. On January 8, **1941,** the Department of Public Safety, Division **of** State Police re-employed Mr. Moody as a police officer at a salary of **$175.00** a month. He continued in this same classification until the day of his accident on February **28, 1949.** During this last period of employment Mr. Moody received periodic salary increases. The last increase was on July **1, 1947,** when his salary was increased from $213.00 to $235.00 a month. His earnings in the year preceding his injury totaled **$2,820.00.**

"February **28, 1949,** Officer Moody together with other officers had been detailed by Lt. John S. Stuper to weigh trucks at the Cargill Soy Bean Mill located near the junction of U. S. **66** By-pass and Route U. S. **54,** Due to the heavy traffic coming to a nearby stock yards on a relatively narrow road that passes the scales, Officer Louis Seeman, in charge of the weighing detail, decided to discontinue weighing trucks about 9:45 A.M. until the situation cleared. Officer Elmer J. Emerson was reached by radio, and Officer L. O. Cartwright walked over to Officer Moody's post and told him to discontinue sending trucks to the scales until further notice. Officer Cartwright returned to the scale house, and it is believed Officer Moody went to the Charles Restaurant located nearby for a cup of coffee. At approximately 10:00 A.M. Officer Moody was seen driving his police car slowly in a westerly direction on Sangamon Avenue toward a road on the right that leads to the Cargill Soy Bean Mill. The north, or right side of the pavement was lined with trucks waiting to be weighed, and as he drove past these waiting trucks, several drivers noticed that Mr. Moody's head was turned to the right as if making a visual inspection of the waiting trucks. His progress was so slow that all observers thought he was aware of an Illinois Terminal Freight train approaching from the south, and which would probably cross the highway ahead of Mr. Moody. This belief was strengthened by the fact that the locomotive

whistle was blowing, the bell was ringing, and the automatic traffic signal light and bell were flashing and ringing at the railroad crossing. Apparently Mr. Moody's preoccupation with other matters made him oblivious to these warning signals because he continued on at an estimated five miles per hour speed onto the tracks, where the left front of the car and the right front of the electric locomotive collided.

"The force of the moving train swung the front of the car to the north and threw it against the railroad crossing signal standard at the northeast corner of the intersection, breaking the standard off. The car came to rest a few feet north of the pavement slab and almost immediately burst into flame. One **of** the waiting truck drivers pulled Mr. Moody from the blazing car. His clothes had caught on fire, and he was badly burned in addition to a fracture **of** his right leg and chest injuries.

"The Division of State Police sent Mr. Moody to St. John's Hospital, Springfield, by ambulance, where Drs. Albert T. Kwedar and Darrell H. Trumpe gave first aid and such additional treatment as they thought necessary; however, Mr. Moody died at approximately 12:15 P.M. that same day.

"March 7, 1949, Dr. Albert T. Kwedar sent the following report to the Division of State Police:

> 'Patient's story of accident—Car hit by train. Name of any other physician who served on this case—Dr. Darrell H. Trumpe. Was he your consultant or assistant?—Consultant. His address—Sangamon Avenue Road. Who authorized your services?—Patient. Nature **of** injury—Right hand charred, left hand charred, left leg and foot charred, comminuted fracture of right femur, fracture of sternum, crushing injury left ribs and chest with paroxymal respirations, burned eyes and hair and severe shock. Treatment—**(1)** shock: plasma and parental fluids administered, (2) immediate care of eyes, **(3)** debridement and vaseline pressure dressings to right and left hand, left leg and knee, neck and 'head, right chest and back, **(4)** immobilization fracture of right femur, (5) assisted Dr. Trumpe with surgery of left chest. Expired February 28, 1949.'

"March 15, 1949, the Division received the following report of Dr. Darrell H. Trumpe:

> 'Patient's story of accident—Police car was struck by an interurban, and the car caught fire. Patient unable to get out of car because of injuries. Name of any other physician who served on this case—A. T. Kwedar, M.D., 412 S. 7th Street, Springfield, Illinois. Was he your consultant or assistant?—Consultant. His address—412 **S.** 7th Street, Springfield, Illinois. Who authorized your services?—A. T. Kwedar, M.D. Nature of injury—Depression fractures 3rd, 4th and 5th ribs of left chest; possible fracture **of** sternum. Traumatic pneumothorax and possibly hemothorax, left lung. Possible contusion of heart. Extensive burns of face, body and

extremities. Comminuted fracture of right femur (burns and fracture **of** right femur and condition **of** shock was treated by **Dr.** A. T. Kwedar). Treatment — Treatment limited to chest. Under local anesthesia, skeletal traction was applied to the 3rd rib, anteriorly and elevation **of** rib cage; 5# **of** traction applied to maintain elevation. Remarks — Patient seen as an emergency consultation with Dr. **A,** T. Kwedar. Patient expired approximately one hour after the above treatment was completed in an emergency room.'

"The Division of State Police has paid the Pollowing creditors in connection with Mr. Moody's accident:

Dr. Albert T. Kwedar, Springfield..	$100.00
Dr. Darrell H. Trumpe, Springfield..	75.00
St. John's Hospital, Springfield.	**127.00**
Charles T. Bisch & Sons (Amb.), Springfield	5.00
Total..	$307.00"

Upon consideration of the case, the Court finds it has jurisdiction of the parties hereto and of the subject matter; that the injury which resulted in the death of Mr. Moody arose out of and in the course of his employment; that the respondent had proper notice of the accident and the death of Mr. Moody and the application for claim mas filed in proper time as provided under Section **24** of the Workmen's Compensation Act, as amended. We further find from this record that the deceased's annual earnings during the year immediately prior to his death amounted to the sum of $2,820.00, making his average weekly wage amount to the sum of approximately $54.00. His weekly compensation rate, therefore, would be $19.50 under the Workmen's Compensation **Act,** as amended and in force on July 1, 1947.

We further find that under Section 7 **(a)** of the Act, claimant is entitled to an award.

An award is hereby entered in favor of claimant, Mary Frances Moody, in the sum of $5,200.00. Of this sum there has accrued to September **23, 1949,** the sum of' $565.50, being **29** weeks at $19.50 per week, which is payable forthwith to her in lump sum.

The remainder of said award amounting to the sum of $4,634.50 is payable to claimant, Mary Frances Moody, at a weekly rate of $19.50 commencing September 27, 1949, for 237 weeks with one final payment in the sum of $13.00.

The future payments hereinabove set forth being subject to the terms of the Workmen's Compensation Act of Illinois, jurisdiction in this cause is hereby retained for the purpose of making further orders that may be from time to time necessary.

An award is also entered in favor of Hugo Antonacci for stenographic services in the sum of $16.00, which is payable forthwith. The Court finds that the amount charged is a fair and reasonable charge and customary, and said claim is allowed.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(Nos. 4058 and 4059—Claims denied.)

FRANK C. WEBER, M.D., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 20, *1949.*

FRANK C. WEBER, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where claim will be* denied. Where an employee of the Illinois Public Aid Commission was injured in the performance of her duty and the complaint shows on its face that more than two (2) years had elapsed from the date of the alleged damages to the filing of the complaint, the Court is without jurisdiction, and such claims are barred by Section 22 of the Court of Claims Act. (Chapter 37, paragraph 439.22, Illinois Revised Statutes 1947).

LIMITATIONS—*what* constitutes. Where claimant fails to file claim within two (2) years of the date of the accident, claim is barred by Statute.

DELANEY, J.

On January 8, 1948, the claimants filed their complaints in both of the above captioned cases which were later consolidated.

The complaints allege that on September 25, 1945, Kathryn S. Clark, an employee of the Illinois Public Aid Commission, was injured in the City of Olney, Illinois, while engaged in the performance of her duties. Claimants further allege that at the direction and request of the respondent, professional services were rendered Kathryn S. Clark.

The record consists of complaint, motion of respondent to dismiss, notice to call up motion to dismiss, reply of claimant, transcript of evidence, commissioner's report, and waiver of brief of claimant.

Section 24 of the Workmen's Compensation Act, (Chapter 48, Paragraph 161, Illinois Revised Statutes 1947) provides :

"161. No proceedings for compensation under this Act shall be maintained unless notice of the accident has been given to the employer as soon as practicable but not later than thirty days after the accident, except in cases of hernia, in which cases notice shall be given the employer within fifteen days after the accident. In case of mental incapacity of the employee or any dependents **of** a deceased employee who may be entitled to compensation under the provisions of this Act, the limitations of time by this Act provided shall not begin to run against said mental incompetents until a conservator or guardian has been appointed: Provided that where such limitation bars. an adult mentally competent member of a class of beneficiaries entitled to receive compensation for death, such limitation shall then bar all beneficiaries notwithstanding that another or others be mentally or otherwise incapacitated or incompetent.

"No defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings of arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy. Notice of the accident shall give the approximate date and place of the accident, if known, and may be given orally or in writing; provided, no proceedings for compensation under this Act shall be maintained unless claim for com-

pensation has been made within six months after the accident, provided, that in any case, unless application for compensation is filed with the Industrial Commission within one year after the date of the accident, where no compensation has been paid, or within one year after the date of the last payment of compensation, where any has been paid, the right to file such application shall be barred; Provided, further, that if the accidental injury results in death within said year, application for compensation for death may be filed with the Industrial Commission within one year after the date of death, but not thereafter. As amended by act approved July 24, 1939."

Section 22 of the Court of Claim Act, (Chapter 37, Paragraph 439.22, Illinois Revised Statutes 1947) provides:

"439.22. Every claim cognizable by the Court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless it is filed with the clerk of the court within two years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues two years from the time the disability ceases."

The complaint shows on its face that more than two years had elapsed from the date of the alleged damages to the filing of the complaints. Therefore, under the law, this court is without jurisdiction to hear and determine these claims for the reason that the statute of limitations had run against the claimants.

Having concluded that we are without jurisdiction to hear and determine this claim, it becomes unnecessary to discuss any other questions.

The motion of the Attorney General is allowed. Complaint dismissed.

(No. 4148—Claimant awarded $925.00.)

WAYNE CAUDLE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 20, 1949.

J. KELLY SMITH, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—*where hole in Xtate Highway causing damage to automobile existed for four or five days allowance will be made.* Where claimant's automobile hit a hole 3 feet long and 18 to 24 inches wide, and the hole existed for four or five days to the knowledge of a highway maintenance man employed by the State, allowance for the car, which was a complete wreck as a result, will be made.

NOTICE—time amounting to notice. Four or five days knowledge of the existence of a hole in highway constitutes notice of such defect.

DELANEY, J.

Claimant filed his claim on December 22, 1948, alleging that on the evening of December 24, 1947, at about 8:30 P. M. while driving his 1939 Dodge four-door sedan automobile at a moderate rate of speed on State Highway No. 37 between Olmsted, Illinois, and Mound City, Illinois, in Pulaski County, said claimant struck a hole in the pavement as he entered a curve in the road; that claimant lost control of his automobile causing said automobile to overturn twice, damaging the automobile beyond repair, and claimant also alleges that he sustained personal injuries.

The record consists of the complaint, transcript of evidence and claimant's waiver of brief. The evidence shows that a hole measuring 3 feet long, 18 to 24 inches wide, and 3 inches deep developed in the paved road near the center line of said highway and that a highway maintenance employee of respondent had knowledge of this damaged pavement for four or five days prior to the accident.

The evidence further shows that the claimant's automobile had a value of approximately $1,200.00 at the time of the accident; that it was a total wreck and that claimant sold the damaged automobile for the sum of $300.00. The evidence further shows that claimant received minor injuries and had a doctor bill for treatment administered to him by Dr. Hudson in the amount of $25.00. The evi-

dence fails to prove damages for use of automobile, loss of wages and physical suffering for injuries sustained as set forth in claimant's complaint; that as a direct and proximate result of the negligence of the respondent claimant is entitled to an award in the sum of $900.00 representing the actual loss he sustained on his automobile and the sum of $25.00 representing professional services rendered by his doctor.

The evidence further shows that the claimant was the sole owner of the automobile which was damaged.

An award is therefore entered in favor of claimant, Wayne Caudle, for the sum of $925.00.

(No. 4149—Claim denied.)

SHAN DURKIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 20, 1949.

SHAN DURKIN, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION *Am—where* ***claim*** *will be denied.* Where secretary in the offices of the Director of the Department of Public Works and Buildings was hit by a swinging gate between rooms causing her to fall and resulting in fracture above her right elbow and a tearing of the ligaments, and she returned to work within a week after the accident and was paid her full salary, and failed to file her claim until 18 months after the accident, the Court held that it has no jurisdiction under the Act, as provided in Section 24 thereof.

LANSDEN, J.

Claimant, Shan Durkin, seeks to recover under the provisions of the Workmen's Compensation Act for the partial loss of use of her right arm and for medical expenses incurred and paid by her in the amount of $329.00 as a result of an accident arising out of and in course of

her employment as secretary to the Director of the Department of Public Works and Buildings.

The accident occurred on July 23, 1947, in the suite of offices in the Capitol Building, Springfield, Illinois, of the Director and Assistant Director of the Department of Public Works and Buildings. Claimant was going from the inner office to the reception room and was struck by the swinging gate between such rooms which caused her to lose her footing and fall to the floor. As a result of the falling, claimant sustained a comminuted displaced fracture above the elbow of her right arm and the tearing of the fascia and ligaments in her right elbow.

Claimant paid all of the medical and hospital bills incurred in connection with her accident, and treatment continued until December 8,1948.

The record also shows that within a week after her accident, claimant returned to work and was paid her full salary and mas never paid any compensation.

Claimant filed her complaint on December 22, 1948, approximately eighteen months after the accident occurred.

This Court has repeatedly held that it has no jurisdiction to hear a claim under the Workmen's Compensation Act where the claimant fails to file her claim within the time set by Section 24 of said Act. *Stuenkel* v. *State,* 16 C.R.R. 34; *Stallard* v. *State,* 16 C.C.R. *78; Benner* v. *State,* 16 C.C.R. 104; *Britt* v. *State,* 16 C.C.R. 114; *Rathje* v. *State,* 16 C.C.R. 177; *Clifton* v. *State,* 16 C.C.R 298; *Domianus* v. *State,* 17 C.C.R. 197.

The Stuenkel case above cited is quite similar to the instant case on the facts and the law therein announced is controlling.

Hugo Antonacci, 502 Illinois National Bank Building, Springfield, Illinois, was employed to take and trans-

cribe the evidence before Commissioner Jenkins. Charges in the amount of $14.20 were incurred for such services, which amount is fair, reasonable and customary, and an award is therefore entered in favor of Hugo Antonacci for such amount.

Claimant having failed to comply with the provisions of Section 24 of the Workmen's Compensation Act, her claim must be and is hereby denied.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4155—Claim denied.)

FRANK LEWANDOWSKI, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed ***October*** *20, 1949.*

FRANK LEWANDOWSKI, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where allowance will be denied.* Where an employee of the Division of Highways failed to file his claim within one (1) year from the date of the accident, the Court is without jurisdiction, as provided in Section 24 of the Act and the claim will be denied.

DELANEY, J.

On December 29, 1948, the above named claimant through his attorney, filed an application for benefits under the Workmen's Compensation Act.

The complaint alleged that on or about April 22, 1947, claimant was injured by reason of an accident arising out of and in the course of his employment with the Division of Highways of the State of Illinois.

On the 23rd day of June, 1949, John R. Lamb, attor-

ney of record for claimant herein, withdrew his appearance in this cause.

Record consists of the complaint and a motion to dismiss filed by the Attorney General.

Section **24** of the Workmen's Compensation Act prescribes the limit of time in which an action may be brought for liability for accidental injury and, insofar as is applicable to the present injury, provides as follows:

"Provided, that in any case unless application for compensation is filed with the Industrial Commission within one year after the date of the accident, where no compensation has been paid, ***or*** within one year after the date of the last payment of compensation, where any has been paid, the right to file such applications shall be barred."

The filing of **a** claim for compensation under the Workmen's Compensation Act is jurisdictional and a condition precedent to the right to maintain a proceeding under the Act. *Black* vs. *Industrial Commission,* **393** Ill. 187.

This complaint shows on its face that it was filed in this court more than one year after claimant's alleged injury; therefore, this court is without jurisdiction to hear and determine the issues raised by this complaint.

For the reasons assigned, the motion of the Attorney General to dismiss is hereby allowed.

Complaint dismissed.

(Nos. **4159** and 4160—Claims denied.)

STELLA DUFFIE AND OPAL FERN HUKILL, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed October 20, **1949.***

BERNARD G. MAXWELL, Attorney for Claimant.

IVAN **A.** ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—where knowledge of a highway defect is contributory

negligence. Where two juvenile officers having previous knowledge of a gap in a State Highway and failed to slow down their automobile notwithstanding warning signs showing "Slow" and "Gravel Gap", and causing severe damages to the car and severe personal injuries to the driver and her companion. Held that they were both guilty of contributory negligence and that the claims of both will be denied.

CONTRIBUTORY NEGLIGENCE—where contributory neglzgence of one will bur recovery of either. Where two or more persons are engaged in a joint enterprise or undertaking in the use of an automobile, the contributory negligence of one will bar recovery of either.

JOINT ENTERPRISE—Where the joint use of a car will be a joint enterprise. When the journey in which the occupants are participating is itself a part of a business in which the parties are mutually interested, they are engaged in a joint enterprise. (Citing Grubb v. Illinois Terminal Co., **366** Ill. **330** at 338-339).

SCHUMAN, C. **J.**

The Opal Fern Hukill and Stella. Duffie cases have been consolidated for this opinion.

All of the evidence in this case was cffered by claimants. The undisputed facts show that Opal Hukill was driving a 1941 Chevrolet automobile over and along Illinois State Highway Number 95 at a point about two miles west of the Village of Smithfield in Fulton County; that Stella Duffie was with claimant Opal Hukill and both were on official business for the County of Fulton in the placing of a small child. Claimant, Opal Hukill, was a juvenile probation officer and Stella Duffie her assistant.

The facts show that it was dark, raining and that both parties and particularly claimant, Opal Hukill, the driver, knew of condition of the road and were familiar with it, having driven over it many times; that there was about a 400 foot gravel gap in the road and warning signs. were posted showing "Slow" and "Gravel Gap"; that claimant, Opal Hukill, saw the sign and mentioned to claimant, Stella Duffie, about the gap before reaching it; that claimant, Opal Hukill, applied her brakes before she got *to* the gap and hit a chuck hole going about **30** miles

per hour, causing her car to swerve to the left and travel about 400 feet, going into a ravine "filled with water".

Witnesses, thoroughly familiar with the road, stated gap had been there since 1934 and was worked on two to three times a week because it was a bad road, all of the time constantly moving because it was believed to have quick sand underneath; that they always drove slow over it at about 8 to 10 miles per hour.

Claimants both alleged in their complaints that holes were in the "rad for a long time and that said place was unsafe and dangerous.

The undisputed testimony shows that claimant, Opal Hukill, knew of the bad spot in the road. However, on a dark, rainy night, with warning signs present, she drove her car at a rate of speed of 30 miles per hour, hit a chuck hole and went 400 feet into a ravine on the left side of the road, over-turning her car causing severe damages to the car and severe personal injuries to herself and to claimant, Stella Duffie.

Even though it might be contended that the gap was defective and dangerous, it was incumbent on claimant, Opal Hukill, to prove she was in the exercise of due care and caution. There is no charge of wilful and wanton misconduct on the part of the respondent. Under the circumstances of this case we feel she has not proven due care and caution. It has long been the rule in this state that it is the duty of persons about to cross a dangerous place to approach it with care commensurate with the known danger, and when one on a public highway fails to use ordinary precaution while driving over a dangerous place, such conduct is by the general knowledge and experience of mankind condemned as negligence. (*Dee* v. City of *Peru,* **343** Ill. **36** at 41). For this reason the claim of Opal Hukill will be denied.

The testimony shows that Stella Duffie and Opal Hukill were engaged in a joint enterprise. Both parties were employed by the County of Fulton in its probation department and were on the business of placing a small child. Both were receiving compensation for their work and were engaged jointly in its performance. When two or more persons are engaged in a joint enterprise or undertaking in the use of the automobile, the contributory negligence of one will bar recovery of either, where the claimed damages arise out of a matter within the scope of a joint undertaking. When the journey in which the occupant, including the driver of the vehicle, are participating, is, itself, a part of a business enterprise in which the parties are mutually interested, they are engaged in a joint enterprise. (*Grubb* v. *Illinois Terminal Co.*, 366 Ill. 330 at 338-339). The negligence of claimant being imputable to claimant, Stella Duffie, her claim will likewise be denied.

Both the claims of Opal Hukill and Stella Duffie, for the reasons assigned, are denied and the petitions dismissed.

(No. 4186—Claimant awarded $628.87.)

JOHN SHEPHERD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed ***Octob'er 20,*** *1949.*

JOHN SHEPHERD, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where* ***award wall*** *be made under.* Where a laborer employed **by** the Division of Highways, in cleaning cinders from a dump truck, and while so engaged the tail gate of the truck came down on his right hand resulting in injuries including the loss of the distal phalanx of his index finger, he was awarded for the loss of the distal phalanx of the index finger and **35%** permanent and

complete loss of the use of the middle finger in the sum of $628.87 under the **Act.**

SCHUMAN, C. J.

Claimant, John Shepherd, was employed by respondent in the Department of Public Works and Buildings, Division of Highways. He worked as a laborer, and on the 9th day of February, 1949, at the truckyard of the Division, he was cleaning frozen cinders from a dump truck body for its later use in hauling asphalt. While so engaged, the tail gate of the truck came down on his right hand. His injury included the loss of the distal phalanx of his index finger.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act and the accident in question arose out of and in the course of the employment. Respondent furnished complete surgical, medical and hospital treatment.

At the time of the injury claimant was 73 years of age and had no children under the age of sixteen years. The claim was filed within the time provided by the Workmen's Compensation Act.

At approximately 10:00 A. M. on the above day, while occupied with cleaning the frozen cinders from the dump truck body, claimant, standing on the ground, was required to raise the tail gate to remove the cinders. The tail gate slipped from his grasp and fell, crushing his right hand. The end of his index finger at a point just below the nail was almost severed; the top side of his middle finger was lacerated. The respondent took claimant to the Condell Memorial Hospital, Libertyville, Illinois, where Dr. M. D. Penney amputated the right index finger at a line just back of the nail and through the mid-portion of the distal phalanx.

The middle finger has a scar running through the

length of the upper side. It is much thicker in appearance than the same finger on claimant's left hand. In making a fist claimant's right hand cannot be closed normally, a gap of about two inches existing between the end of his middle finger and his palm. Inability to close the middle finger hinders the use of his right hand in gripping objects. As a result of his injury he cannot now use tools with his right hand.

Claimant's earnings, exclusive of overtime, in the year preceding the accident amounted to $1,753.20. Claimant was totally disabled from February 10th to 20th, inclusive, and was paid compensation at the rate of $19.50 a week from the 17th to the 20th of February, inclusive, in the amount of $11.14.

The Departmental report contains the report of Dr. Penney, dated March 22, 1949, concerning claimant's injury. This report in part states as follows:

". . . Nature of Injury — Amputation distal phalanx index finger right. Laceration middle finger right. Treatment — Surgical repair of amputated finger index right hand. Stitches lacerated middle finger. Dressings. Estimated date of discharge — February 9, 1949. Estimated date patient able to work — Possible three to four weeks."

The only question to be determined is the extent of the injury and loss of use of the fingers in question.

On the basis of this record, we make the following award:

For the loss of the first or distal phalanx of the first finger, commonly called the index finger, and for 35% permanent and complete loss of the use of the second or middle finger, the sum of $628.87, payable at the rate of $19.50 per week, all of which has accrued and is ordered payable forthwith.

An award is also entered in favor of William J. Cleary & Co. for stenographic services in the amount of $26.90 which is payable forthwith. The court finds that

the amount charged is a fair and reasonable charge and customary, and said claim is allowed.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4187—Claimant awarded $5,200.00.)

FLORENCE M. LIPPLE, WIDOW, ET AL., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 20, 1949.

MEYER AND MEYER, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where award will be made under.* Where an employee of the State Division of Highways was ordered by his superior to load his truck with treated cinders and spread them on hills and curves on ice coated hills, and while shoveling cinders from the stock pile to his truck developed a sharp pain in his chest which was diagnosed as coronary occlusion from which he died, held that his widow was entitled to award under Section 7(a) of the Act.

HEART *ATTACK—where heart attack will be considered accidental injury arising out of and in the course of employment.* Where there is no showing of pre-existing diseases and an employee while at work involving unusual exertion or strain suffers a heart attack, such attack is held to accidental injury arising out of and in the course of his employment under the Act. (Citing Marsh v. Ind. Com., 386 Ill. 11).

DELANEY, J.

Claimant, Florence M. Lipple, is the widow of Harold Lipple, who was employed by respondent in the Division of Highways, and seeks an award for the death of her husband under the provisions of the Workmen's Compensation Act.

On January 18, 1949, a heavy snow caused the highways in the vicinity of Greenville, Bond County, to become coated with ice, which made driving hazardous. At approximately 3:00 A.M., Mr. Lipple received a tele-

phone call at his home from a superior, who instructed him to load his truck with treated cinders, and spread them on the hills and curves of his maintenance section. Mr. Lipple with the aid of his helper at approximately 4:30 A.M., while shoveling cinders with a No. 2 scoop from the stock pile, into his truck, developed a sudden sharp pain in his chest and collapsed. He was taken to his home, and Dr. William L. Hall, his family physician, diagnosed his injury as coronary occlusion following the strain of shoveling frozen cinders. The following afternoon Mr. Lipple was taken by ambulance to St. Joseph's Hospital in Highland and died at the hospital on January 23, 1949.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment.

Dr. William L. Hall testified that he had examined Mr. Lipple a short time before the injury and found him in good physical condition and that Mr. Lipple had never been known to complain of his heart or a pain in his chest. Dr. Hall further testified that coronary occlusion was brought on by the exertion in hurrying to put cinders on the road.

A long line of cases held that where there is no showing of pre-existing diseases and an employee while at work, usually of a heavy nature or involving unusual exertion or strain, suffers a heart attack, such attack is held to be an accidental injury arising out of and in the course of employment under the Workmen's Compensation Act. *Marsh* v. *Ind. Comm.*, 386 Ill. 11, is a recent case wherein are reviewed many of the cases falling in this category. There must, however, be an accidental injury as the immediate or proximate cause of death.

We find from this record that deceased's annual earnings during the year immediately prior to his death amounted to the sum of $2,436.00, making his average weekly wage amount to the sum of $46.84. His weekly compensation rate therefore would be $19.50 under the Workmen's Compensation Act, as amended and in force July 18, 1947.

We further find that under Section 7(a) of the Act, claimant is entitled to an award.

An award is hereby entered in favor of claimant, Florence M. Lipple, in the sum of $5,200.00. Of this sum there has accrued to October 17, 1949, the sum of $741.00, being 38 weeks at $19.50 per week which is payable forthwith to her in lump sum.

The remainder of said award amounting to the sum of $4,459.00 is payable to claimant, Florence M. Lipple, at a weekly rate of $19.50 commencing October 24, 1949, for 228 weeks with one final payment in the sum of $13.00.

The future payments hereinabove set forth, being subject to the terms of the Workmen's Compensation Act of Illinois, jurisdiction in this cause is hereby retained for the purpose of making further orders that may be from time to time necessary.

Esther A. Kersey, Court Reporter, was employed to take and transcribe the evidence in this case and has rendered a bill of $16.69. The Court finds that the amount charged is fair, reasonable and custcmary, and that said claim be, and is hereby allowed.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4189—Claimant awarded $341.25.)

LOGAN MARLIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 20, 1949.

LOGAN MARLIN, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award will be made under.* Where an employee of the Secretary of State while engaged in putting a frame around an exhaust fan in the Capitol Building caught his left hand in the exhaust'fan and sustained a minor injury to his left index finger, and injury of a permanent nature to the middle finger of his left hand which was badly lacerated, twisted and badly displaced, with almost Complete stiffness and total loss of use of the last joint of said finger, he was entitled to an award under the Act.

SCHUMAN, C. J.

Complaint was filed on April 25, 1949, by Logan Marlin for an award under the Compensation Act. Leave was asked and granted claimant to amend his complaint to show injury to the middle finger of the left hand instead of index finger of left hand, 'and the compensation rate as $19.50 per week instead of $15.00 per week.

The complaint, answer of Secretary of State and the evidence discloses the following: That claimant and respondent were operating under the provisions of the Workmen's Compensation Act, that notice and claim for compensation were made within the time provided by the act and that the accident arose out of and in the course of claimant's employment. That claimant's earnings during the year preceding the accident were $3,845.75, and that he had one child under 16 years of age dependent upon him for support.

The evidence further discloses that on the date of April 26, 1948, at approximately 8:30 A.M., while engaged in putting a framing in and around an exhaust fan in the capitol building basement he caught his left

hand in the exhaust fan. That immediately. after the accident he was taken to Memorial Hospital in Springfield and was later treated by Ur. James Graham. That the Memorial Hospital rendered a statement in the amount of $5.60 and Ur. James Graham in the amount of $22.00, and that same have not been furnished by the respondent.

The evidence further discloses that claimant received an injury to the left index finger of a minor nature and that he received injury of a permanent nature to the middle finger of the left hand. From the examination of the claimant's hand and finger it was found that the left middle finger was badly lacerated and twisted and that the last joint is badly displaced, with almost complete stiffness and total loss of use of the last joint of said finger.

On the basis of this record, we make the following award :-

For the permanent, partial specific loss of use of the second finger of the left hand, an amount of 50% of loss of use is allowed, making an award of 17½ weeks at $19.50 per week for a total of $341.25, all of which is accrued and is payable forthwith.

An award is also entered in favor of Memorial Hospital, Springfield, Illinois, in the amount of $5.60 for hospitalization, which is payable forthwith.

An award is also entered in favor of Dr. James Graham of Springfield, Illinois, for medical services in the sum of $22.00, which is payable forthwith.

An award is also entered in favor of Hugo Antonacci for stenographic services in the amount of $22.00, which is payable forthwith. The Court finds that the amount charged is a fair and reasonable charge and customary, and said claim is allowed.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4193—Claimant awarded $3,211.30.)

HARLEY R. RANSOM, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion-filed October 20, 1949.

HARLEY R. RANSOM, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award will be made under.* Where an employee of the State Division of Highways, while engaged in shoveling damp stone chips into a power driven heater mixer, slipped out of truck towards the mixer and extended his right hand into the opening of the mixer drum which was caught and crushed, and sustained serious injuries to his right hand resulting in 100% disability **of** said hand, he was entitled to an award therefor under the Act.

LANSDEN, J.

Claimant, Harley R. Ransom, seeks to recqver under the provisions of the Workmen's Cempensation Act for the complete loss of use of his right hand as a result of an accident arising out of and in the course of his employment in the Department of Public Works and Buildings, Division of Highways.

On November 22, 1948, claimant was one of a group of men assigned to dry stone chips preparatory to mixing with bituminous material for road maintenance work at the State Highway storage yard at Wedron, Illinois. Claimant was shoveling damp stone chips out of a truck bed into the drum of a power driven heated mixer and while so working, his foot slipped, causing him to lose his balance and fall out of the truck toward the mixer.

Claimant extended his right hand to break the fall, and this hand entered the opening of the mixer drum, where his hand was caught and crushed between the interior revolving blades and the drum.

Claimant's injuries to his right hand were serious, and medical treatment was furnished claimant by respondent from the date of the accident until April **12,** 1949, and in connection with the medical treatment furnished claimant, respondent has paid the following amounts to the following persons :

Dr. D. Raymun Dwyer, Ottawa..	$100.00
Dr. S. E. Parr (Anesthetist), Ottawa	10.00
Dr. H. B. Thomas, Chicago..	193.00
Ryburn Memorial Hospital, Ottawa.	84.25
Louis Pelzmann (Therapist), Chicago.	104.00
Harley Ransom (expenses), Wedron.	**155.44**
Total..	$646.69

In addition, claimant was paid temporary total disability at the rate of $18.89 a week for the period from November 23, 1948, to April 15, 1949, in the amount of $388.61.

Claimant has complied with all of the jurisdictional requirements of the Workmen's Compensation Act and is entitled to an award.

Claimant on the date of his injury was ***53*** years of age, unmarried, resided in the Village of Wedron, Illinois, and has no children under the age of 16 years dependent upon him for support. The correct rate of compensation in his case is $18.89 per week based on annual earnings in the year preceding his injury of $1,511.10.

The only question for this Court to determine is the extent of the loss of use of claimant's right hand.

The departmental report on file in this case discloses that claimant's right hand was seriously mangled, ripped,

torn and deformed by the accident, and various medical reports indicate that, although claimant was administered to with great skill by doctors to whom he was sent by respondent, nevertheless, his fingers and hand were for some time after the accident in a splint, infected due to dying bone, and his hand was affected by atrophy and loss of movement. The treatment furnished by respondent cleared up all infections, but some of the fingers or joints thereof were necessarily removed.

Claimant was treated at respondent's expense by Dr. H. B. Thomas, Professor Emeritus of Orthopedics, University of Illinois, College of Medicine, Chicago, Illinois, from November **30,** 1948, to April 12, 1949, and on the latter date, Dr. Thomas wrote to respondent the following:

"I examined the above named patient (claimant) this morning. I am dismissing him as of today with a disability of 100 per cent for the right hand . . .".

Commissioner Young, who conducted the hearing in this case and examined claimant's right hand at the hearing, has reported to the Court in part as follows:

"Examination of the condition of claimant's right hand caused by the injuries received as a result of the accident in question discloses the first joint of the thumb to have been amputated. The hand is deformed with scar tissue present on the upper and lower side of the fingers as well as the upper half of the palm. The fingers are bent and deformed as if they had been broken. In comparison with the fingers of claimant's left hand the fingers appear much thinner as if the muscular tissues were atrophied. Claimant cannot oppose the stub **of** his thumb with his other fingers. In making a fist he cannot touch his palm with his fingers."

An award will therefore be entered in favor of claimant as hereinafter computed.

The court reporting firm of William. J. Cleary & Co., **134** North LaSalle Street, Chicago, Illinois, was employed to take and transcribe the evidence before Corn-

missioner Young. Charges in the amount of **$36.30** were incurred for such services, which charges are fair, reasonable and customary, and an award is hereby entered in favor of William J. Cleary & Co. for such amount.

An-award is entered in favor of claimant, Harley R. Ransom, for the complete loss of use of his right hand in the amount of $3,211.30, being .at the rate of $18.89 per week for 170 weeks, to be paid to him as follows: **$887.83,** which has accrued as of October 19, 1949 and is payable forthwith; $2,323.47, which is payable in weekly installments of $18.89 per week for 123 weeks beginning October **26,** 1949.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4195—Claimant awarded **$73.67.)**

GRACE RICKELMAN, Claimant, *vs.* STATE OB ILLINOIS, Respondent.

Opinion filed Octob'er 20, 1949.

J. L. MCLAUGHLIN, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

STATE HIGHWAYS, DEFECTS IN—*where an award will be made for damages caused by.* Where the State Highway Department made an opening across State Highway No. 32 for the placing of a drain tile therein and the surface subsided due to heavy rain creating a hole, and an automobile driven into the subsided portion was damaged, held that it was the State's duty to maintain State Highways in a safe condition, or to warn of unsafe condition, and that such duty had been violated; that there was a causal connection between the violation of the duty and the injury complained.

IN TORT *CASES— what is necessary to prove.* In tort cases four elements must be alleged and proven by claimant: **(1)** Duty of respondent to claimant; **(2)** the violation of such duty; **(3)** a causal connection between the violation of the duty and injury complained of; **(4)** damages to the claimant.

SOVEREIGN IMMUNITY REMOVED—*that the maintenance of State Highways as a governmental functaon as now immaterial.* Ill. Rev. Stat. **1947,** Chap. **37,** Sec. **439.8,** recognizes the duty and liability of the State for damages due to defects in highways.

LANSDEN, J.

Claimant, Grace Rickelman, seeks to recover from respondent the sum of $73.67 for damages to her automobile as a result of her driving it into a subsided portion of State Highway No. 32 at 5:30 P.M. on January 4, 1949, one and one-half miles northwest of Sullivan!, Moultrie County, Illinois. She also' alleged that there were no warning signs or flares near the hole she drove into.

The evidence discloses that the claimant is the owner of the 1936 Ford sedan and that the car was repaired by the Shasteen Motor Company and that said bill in the amount of $73.67 was paid by claimant. Such charges are reasonable.

The departmental report on file in this case reads in part as follows:

"A short time prior to January 4, 1949, Division of Highways maintenance employees installed a line of 15 inch tile across and under said Route **32.** This installation is located north and west of the city of Sullivan, approximately two and one-half miles. To place the tile, which is 9.71 feet below the center of pavement, it was necessary to cut out and remove a strip of concrete pavement five feet wide: This strip extends the full width of pavement, which is eighteen feet.

"After the tile had been laid and connected with a catch basin, the trench was backfilled with the earth previously removed. The backfill was surfaced with gravel and, from time to time, more gravel was added as settlement and compaction took place. When, in the judgment of the field engineer, the filled material had

reached its ultimate settlement, the gap in the pavement was given a four inch premix asphalt wearing surface. The surface of this premix section was laid to the same grade as the adjoining bituminous surfaced concrete pavement.

"Intermittent rains during the two days prior to the accident in question apparently caused a subsidence over the tile. The accident occurred about 5:30 P.M. on Tuesday, January **4,** 1949. At approximately 2:30 P.M. on that date an inspection by Division of Highways personnel showed no settlement over the tile or irregularity in the asphalt wearing surface over it. By reason of those findings it was not found necessary to install signs, lights, or barricades as a warning to the travelling public. The night of January **4,1949,** Division maintenance employees were advised of claimant's accident a short time following its occurrence,. and proceeded immediately to make necessary repairs. It was found that the maximum settlement did not exceed ten inches in depth."

Claimant and the two occupants of her car at the time of the occurrence after dark all testified and their testimony is in agreement as to the lack of visible warning signs or flares at the place of the accident, and claimant further testified that she frequently traveled on the portion of Highway No. 32 involved, and that two days before the accident she passed over the spot where the subsidence later occurred, and that the road was smooth. She also testified, and was corroborated by other witnesses, that when there was a dangerous condition previously at the place of the accident flares and sometimes barricades were used to warn approaching drivers.

The previous conduct of State highway maintenance personnel indicated an awareness of the possibility of a dangerous condition resulting.

This case discloses the obligation that respondent has assumed in maintaining and repairing the Illinois State Highway system. The 1945 Court of Claims Act in effect recognizes that obligation by removing respondent's sovereign immunity for suit in this type of case. Ill. Rev. Stat. 1947, Chap. 37, Sec. 439.8. That the maintenance of state highways is a governmental function is now immaterial. *Newman* v. *State*, 17 C.C.R. 187; Cf. *Cerri* v. *U. S.*, 80 F. Supp. 831. This Court's inquiry is now directed to the determination of the existence of negligence on the part of respondent proximately resulting in the injury complained of.

Stated differently, in any tort case four elements must necessarily be alleged and proven by claimant. 1) The duty of the respondent to claimant. 2) The Violation of such duty. 3) A causal connection between the violation of the duty and the injury complained of, and 4) damages to claimant.

Respondent's duty to maintain State highways in a safe condition or to warn of unsafe conditions is manifest. That such duty was violated in this case is also evident and that there was a causal connection between the violation of the duty and the injury complained has been proven. The damages sustained, although small, are uncontradicted.

Claimant, Grace Rickelman, is therefore entitled to an award, and one is hereby made in her favor in the amount of $73.67.

(No. 4196—Claimant awarded $650.98.)

EARNIE ROBERSON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 20, 1949.

GLENN E. Moore, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—*where awurd for damages will be allowed for.* Where an auto-truck operated by an employee of the Department of Conservation, negligently collides with an automobile used by claimant as a taxicab, in violation of Section 69 of Uniform Act Regulating Traffic on Highways, the claimant is entitled to damages caused to his taxi and of loss of daily income in use of taxicab while being repaired.

DAMAGES—*measure of damages for loss of use of auto, used as taxicab!* Where an automobile used as taxicab has been damaged and while being repaired the owner was deprived of its use, he was entitled to an award for damages to taxi and the net daily income therefrom less wages of driver, cost of oil and gasoline used in operation.

DELANEY, J.

On January 8, 1949, claimant was the owner of a 1947 four-door Chevrolet sedan automobile used in claimant's taxicab business. On said date at approximately 9:00 A.M., claimant by his agent, James D. Joplin, was driving said automobile in a northerly direction on North Main Street near the intersection of Lawrence Street, in the City of Benton, Illinois. On January 8, 1949, about 9:00 A.M., respondent, by its agent, was driving and operating a Ford truck in a southerly direction along North Main Street at the intersection of Lawrence Street in the City of Benton. Said truck being marked State of Illinois, Game Preserve.

The record in this case consists of the complaint, the amendment to complaint, Report of the Department of Conservation, the transcript of testimony, waiver of statement, brief and argument of claimant, and the statement, brief and argument of respondent.

The evidence shows that the respondent, by its agent, Harrison Sexton, in following another truck of respondent into a gasoline filling station, made a sharp left hand turn directly in front of claimant's car, causing respondent's truck to strike the left front of claimant's automobile, wherein claimant sustained damage to his said automobile in the amount of $446.98.

The evidence further shows that the claimant's automobile was repaired in 17 days and that this was a reasonable length of time; that the net daily income of this automobile as a taxicab, after deducting the wages of the driver and the cost of gasoline and oil, was approximately $12.00 per day or a total of $204.00; that as a direct and proximate result of the negligence on the part of the respondent, through its agent, in violation of Section 69 of the Uniform Act Regulating Traffic on Highways, Chapter 95½, Section 166, Illinois Revised Statutes of 1947, claimant is entitled to an award in the sum of $650.98, representing the damages to his automobile and the loss he sustained in his business as the operator of a taxicab while the automobile was being repaired.

The evidence further shows that the claimant was the sole owner of the automobile which was damaged.

An award is, therefore, entered in favor of claimant, Earnie Roberson, for the sum of $650.98.

(No. 4081—Claimant awarded $3,980.62 and Life Pension.)

HENRY D. HINKLE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 23, 1949.

Supplemental Opinion filed November 9, 1949.

STONE AND FOWLER, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney' General; C.' ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION *Am — where an award will be made tinder.* Where an employee of the Division of Highways assigned to scatter cinders manually on icy hills and curves on State Aid Route No. 2, and he lost his balance falling backward, his lower back striking the cab and signal lamp, and sustaining permanent injuries, being unable to work thereafter, an award therefor will be made under the Act.

DELANEY, J.

On January 7, 1947, the claimant, Henry D. Hinkle, an employee, of the respondent in the Department of Public Works and Buildings, Division of Highways, was assigned to scatter cinders on icy hills and curves on State Aid Route No. 2. The work was done manually from a truck loaded with cinders. The truck was driven by Earl S. Fowler, a highway sectionman's helper, and claimant shoveled cinders from the rear of the truck. While working two miles south of Alto Pass, in Union County, the truck skidded and claimant lost his balance, fell backward, and his lower back struck the top of the cab and signal lamp. He lay for several minutes because of pain, and then resumed his work. He worked until January 10, 1947, when his discomfort became so great that he was unable to continue.

On the day he was injured, claimant consulted his family physician, Dr. Ernest Radcliff, at Jonesboro, who prescribed rest, analgesics, anti-spasmodics, and heat. A week later, being dissatisfied with his progress, claimant consulted James C. Kincaid, a chiropractor at Anna, Illinois, who gave him thirty adjustments between January 15, 1947, and April 18, 1947.

On February 4, 1947, Dr. Radcliff reported to the respondent that the claimant's injury consisted of a small bruise at the level of the fifth lumbar spine and down and outward toward the left iliac-sacral joint. The doctor considered the bruise inconsequential, and stated that the major injury consisted of a bad sprain of all

the muscles attached to the area; he expected no permanent disability.

On March 8, 1948, Dr. Radcliff again reported to the respondent, stating that claimant could do light work, but that he was fearful claimant might have a lame back for many years. Thereupon respondent arranged for claimant's examination and treatment by Dr. J. Albert Key and Dr. Fred Reynolds, orthopedic specialists, in St. Louis, Missouri. The first examination was made on March 25, 1947, and Dr. Reynolds reported to the respondent as follows:

"Examination shows the patient to stand with a moderate stoop-shoulder. There is a good range of motion of the back but the patient complains of pain in the low back on all motions. There is a mild discomfort in the back on straight leg raising. There is tenderness over the spinous processes of the lumbar vertebrae, most marked over the sacrum. There is also some tenderness over the, left gluteal region.

"X-rays showed moderate arthritis with spur formation on the three lumbar vertebrae.

"It is our feeling that this patient was suffering from a mild disc and from aggravation of his arthritis. We recommended that he have a belt and hard bed and take Vitamin B and requested that he return in three weeks so that we might again examine him."

On May 9, 1947, Dr. Reynolds again reported to the respondent as follows:

"We wish to advise that Henry Hinkle was seen again on the 5th day of May, at which time he had been unrelieved by his brace. However, on inspection of the brace it was noted that it did not fit. He was therefore instructed to return to Lehde and Brown so that he might be given a proper fitting brace. Furthermore, examination at this time revealed that the patient's physical signs had become much more definite and that at this time he had very suggestive findings of a ruptured intervertebral disc at the lumbo-sacral junction.

"Should he fail to obtain relief with a satisfactory fitting belt, it may be necessary to consider removal of this disc."

Again on July 2, 1947, Dr. Reynolds sent the following report to the respondent:

"Mr. Henry D. Hinkle was examined again on the 23rd of June, 1947, at which time he stated that his back was causing him more pain

than at the time of his last visit. The pain seems to run up his back and causes headaches. He is also complaining of pain which goes into the left leg to the ankle. These pains are such that he is unable to do any type of work.

"Examination at this time, although it varies somewhat from his previous examination, confirms in our opinion that this man probably has a rupture of an intervertebral disc.

"We recommend that he be admitted to the Barnes Hospital for study at which time a myelogram would be made of the spine and should this reveal that he does have a disc, it should then be removed. These procedures would require the patient to be in the hospital from 10-14 days and should surgery be necessary, the cost of the operation would be $300.00.

"Will you please review this case at your early convenience and let us know whether or not you wish these recommendations carried out."

Claimant was admitted to Barnes Hospital at St. Louis on December 11, 1947, and an examination there disclosed tenderness at the lumbo-sacral junction with limitation and pain on straight leg raising on the left side but with free motion of the spine without much pain. A myelogram revealed no defect in the spinal canal, and the spinal puncture for doing the myelogram gave the claimant almost immediate relief from pain.

Dr. Reynolds stated:

"This remarkable relief **of** pain from the spinal puncture together with other negative findings is very suggestive that Mr. Hinkle's trouble is mostly imaginary.

"We are sending him at this time exercises and would suggest that he be put back to some kind of work at the earliest possible date."

Following this report, Mr. Hinkle was offered work as a flagman, but he refused, saying the relief obtained from his hospitalization was of short duration and he was unable to work. Arrangements were then made for another examination by Dr. Reynolds, and on February 19, 1948, Dr. Reynolds sent the following report to the Division of Highways:

"We wish to advise that this patient was again seen on 18th **of** February, **1948,** at which time the patient stated that about two weeks from the time he went home from the hospital his pain returned. Be-

cause of this return of pain he has not been able to go back to work. The pain is now just the same as it was before he went to the hospital, being located in the low back mostly on the left side and running into the left hip. Since he was last seen there has been a new development in that the pain now runs up his back to the head and causes him severe headaches with dizzy spells,. and at times he is unable to get up because of these dizzy spells. He further states at this time that when trying to walk he drags his left leg.

"It was difficult to make a complete examination at this time because every time the patient would lie down he would grab his head and complain of severe pain and dizzy spells. I do not see that this could have any connection at all with the injury to his back, and from the examination I was able to make, I was unable to come to any conclusion."

Following this report, the case was discussed by Dr. Reynolds and a representative of the Division of Highways. It was agreed that a psychiatric examination was indicated; accordingly arrangements were made for Dr. C. D. Nobles and Dr. D. T. Cole, superintendent and assistant superintendent respectively, of the Anna State Hospital, to make, the examination. The examination was made on March **12,1948.** The doctors reported as follows:

"This is to certify that Dr. D. T. Cole, assistant superintendent of the Anna State Hospital, and Dr. C. D. Nobles, superintendent of the Anna State Hospital, have today examined Henry Hinkle of Union County, Jonesboro, Illinois. He gives his age as **52.** He is a native of Union County and has a home south of Jonesboro, Illinois. He had been working with the highway department about six years before January **7, 1947,** when he received an injury while working on Route 51, unloading cinders, when he fell back against-the cab and light, injuring his back. He states that he has suffered with pain in his back, especially in the lumbar region since that time and since December, 1947, when he had a spinal puncture made in St. Louis, Missouri. This relieved him for a couple of days but since that time he has suffered more or less pain, affecting his neck and having dizzy spells at times. When he has these pains it apparently affects his stomach, having a drawing sensation. He also complains of the lumbar region in the left side, the pains extending down to the anterior surface of the femur. When he carries a bucket of water he has to carry it with his left arm because it hurts him to carry it with his right.

"The petellar reflexes were found to be slightly hyperactive, more on the left than on the right. Tactile sense is normal. There were coarse tremors of the extended fingers, more of the left than the right. Fine

tremor of the extended tongue. Slight Romberg. No other neurological findings found.

"He makes the statement that he has not been able to sleep well since the injury, being restless, suffering with pain. He is unable to walk any distance. When asked about his education, he made the statement he had not finished the eighth grade because he had to work on the farm.

"Mentally, he is well oriented, memory is especially good for a man of his education. He claims he carries a notary public commission and at times has been capable of taking oil leases. From the examination which we have found today, the man is not what we would call mentally ill. There is nothing in his mentality that would keep him from working. The only thing we found was somatic complaints which could be explained on the basis of arthritis following the injury."

Again on February 3, 1949, Dr. Reynolds again reported to the respondent as follows:

"In regard to the above captioned case, we wish to advise that this patient was again examined. today, at which time he states that he is steadily getting worse, that he has constant pain in his back and in the left leg; the pain going down the leg into the foot and into the great toe. He also states that the leg is getting dead and because of these complaints, he has been unable to work since the 7th of January, 1947.

"Examination at this time shows the patient to have limitation and pain on extension of the spine, there is limitation and pain on flexion of the spine. Bending to both sides is painful, but more so on the left than on the right. Straight leg raising on the left is limited and painful. There was tenderness, most marked at the fourth lumbar interspace, also some tenderness at the fifth. The left ankle jerk was decreased and there is weakness of extension of the toes.

"On this date, this patient has a perfectly typical picture of a ruptured intervertebral disc. These symptoms were not present at the time he was hospitalized in March of 1948. I feel that I missed the diagnosis at that time as a result of the lack of findings.

"At this time, I recommend that the patient have removal of the disc and a special fusion operation."

At the time of the accident, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of the State, and notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of the employment.

Claimant testified that he had been taking heat and massage treatments for which he had expended $51.00, and that these treatments gave him temporary relief, and the further sum of $12.00 for medicine, making a total of $63.00 expended.

Claimant's earnings during the year immediately preceding his injury were $1,212.00, making a weekly salary of $23.30. His compensation rate is, therefore, 50% of $23.30, or $11.65. Since the injury occurred subsequent to July 1, 1945, this must be increased 20%, making a compensation rate of $13.98 per week.

The Court finds that claimant is totally and permanently disabled, and that he is entitled to an award of $4,800.00. From this award of $4,800.00 must be deducted the sum of $819.38, payment for non-productive time.

An award is, therefore, entered in favor of claimant, Henry D. Hinkle, in the amount of $3,980.62, payable as follows:

$1,151.80, which has accrued and is payable forthwith.

$2,828.82, payable in weekly installments of $13.98 for 202 weeks, with one final payment of $4.86.

Claimant is also entitled to be reimbursed in the sum of $63.00 expended on account of massage treatments and medicine.

An award is also made in favor of claimant, Henry D. Hinkle, in the amount of $63.00 for massage treatments and medicine, which is payable forthwith.

The testimony taken at the hearings before Commissioner Jenkins was taken and transcribed by Imogene Ward Steph, who made charges therefor in the amount of $74.58. These charges appear reasonable and proper.

An award is, therefore, made to Imogene Ward Steph in the amount of $74.58, payable forthwith.

Future payments being subject to the terms and

conditions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is respectfully reserved for the entry of such orders as may from time to time be necessary.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

SUPPLEMENTAL OPINION

DELANEY, J.

At the recent September term of this Court an opinion was rendered in this cause allowing the claimant, Henry D. Hinkle, the sum of Forty-eight Hundred Dollars ($4,800.00). The Court's attention is now directed to a pension award in claimant's behalf.

An award is, therefore, entered in favor of claimant, Henry D. Hinkle, after the completion of his payments for total and permanent disability of a pension for life in the sum of $384.00 annually, payable in monthly installments of $32.00.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4197—Claimant awarded $416.00.)

CLIFFORD H. OLSEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1949.

JAMES E. BOYLE, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award will be made under.* Where an employee of the Division of Highways engaged in

mowing vegetation on the right-of-way with a power driven mower had his left index finger caught in the mower belt and crushed between the belt and the pulley resulting in permanent partial specific loss of such index finger he will be entitled to an award therefor under the Act.

SCHUMAN, C. J.

Claimant, Clifford H. Olsen, was first employed by the State of Illinois by the Division of Highways, Department of Public Works and Buildings, on December 21, 1941. That on May 28, 1948 he was assigned to mow vegetation with a power driven mower on the right-of-way of Route U. S. 34 in DeKalb County. That he encountered difficulty with the mower and in adjusting the belt control, his left index finger was caught by the moving belt and crushed between the belt and belt pulley.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident arose out of and in the course of employment. The facts show that the claimant's earnings for the year preceding the accident were $2,225.35.

The State furnished medical and hospitalization and no claim is made for any additional medidal and hospital expenses.

The medical report, the evidence and an inspection of the claimant's finger reveals the following:

That the distal end of the left index finger was severed and ¼ inch of bone of the distal phalanx was removed by the doctor. The examination of the finger by Commissioner Wise revealed it to be approximately ⅜ inches shorter than the right index finger; that there is almost complete loss of motion of the distal joint of said finger and that claimant has only about 45% motion in the distal joint when pressure is applied with the right hand: that the nail has grown back and is smaller than on the other hand and that the finger was scarred and sensitive and numb.

The facts show that the claimant was married and was standing in loco parentis with reference to two step-

children under the age of 16 years who were dependent upon him for support.

The evidence clearly establishes that the claimant has sustained permanent partial specific loss of the index finger of the left hand to the extent of 50%.

On the basis of this record, we make the following award:

For the permanent, partial specific loss of the use of the index finger of the left hand, claimant is entitled to an award of **$416.00** for a period of **20** weeks at $20.80 per week or 50% **loss** of use of the index finger of the left hand.

All of this compensation has accrued and is payable forthwith.

An award is also entered in favor of Emma Tweed, 261 East Lincoln Avenue, DeKalb, Illinois, for stenographic services in the amount of $21.50, which is payable forthwith. The Court finds that the amount charged is fair and reasonable and customary and said claim is allowed.

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees."

(No. 4093—Claim denied.)

DAVID S. HENDRICKS, Claimant, *vs.* **STATE** OF ILLINOIS, Respondent.

Opinion *filed December* **7,** *1949.*

EUGENE H. WIDMAN, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WRONGFUL DETENTION—*where claim will be denied for.* Where an employee, an electrician for the Granite City Street Plant was, on order of Circuit Court of St. Clair County that he be recommitted to Altoa

State Hospital, detained for that purpose by officers, agents and employees of the State, the claim for wrongful detention will be denied.

DELANEY, J.

On June 18, 1948, the claimant filed his complaint in the above entitled cause.

The complaint alleges that on April 29, **1943,** while claimant was employed as an electrician at Granite City Street Plant in Granite City, Illinois, he was taken from his employment and wrongfully detained by officers, agents or employees of the State of Illinois.

The record consists of a complaint, a motion of respondent to dismiss, notice to call up motion to dismiss, an amended complaint, a motion of respondent to dismiss amended complaint and notice to call up motion to dismiss.

The claimant, David S. Hendricks, was held by the State of Illinois by virtue of the judgment of the County Court of St. Clair County, signed by J. E. Fleming, Judge of the County Court of St. Clair County, Illinois, whereby it was ordered and adjudged that the said David S. Hendricks be re-committed to the Alton State Hospital at Alton, Illinois, a copy of which judgment, finding and, order, duly certified to by George Renner, Jr., Clerk of the County Court in St. Clair County, is in the record.

Having concluded that claimant had been properly detained, it is unnecessary to discuss any other questions.

The motion of the Attorney General is allowed.

Complaint dismissed.

(No: 2137—Claimant awarded $5,107.04 and Life Pension.)

OLIVER LEADLEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

***Opinion** filed **December** 7, 1949.*

BRIAN T. WILSON AND **HARRY** C. HEYL, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR. NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award wzll be made under.* Where an employee of the Division of Highways, in charge of a group engaged in building a concrete culvert drop box, got down in a 15-foot hole to puddle the footing of the cement and afterwards lifted a concrete mixer and a water pump and hose, each a two-man job, and as a result **of** over-exertion suffered a coronary thrombosis and was permanently totally disabled in consequence thereof, an award therefor will be made under the Act.

HEART ATTACK—*where award wzll be naade.* Where an employee, in the course of his employment suffers a coronary thrombosis in consequence thereof, due to over-exertion, he will be entitled to an award under the Act.

SCHUMAN, C. J.

Claimant, Oliver Leadley, was first-employed by the Division of Highways on October 25, 1926, as a maintenance patrolman. He continued in this position until February 1, 1933, when he resigned. He again re-entered State employment on April 1, 1941 as an extra gang foreman. He continued in this capacity until the date of the alleged injury on November 10, 1947. The salary of Mr. Leadley previous to his injury on November 10, 1947, totaled $2,515.00.

On November 10, 1947, Mr. Leadley was in charge of a group building a concrete culvert drop box about one mile west of Mackinaw on Route 9 in Tazemell County. The job for the day was to pour a concrete footing at the bottom of a 15-foot hole. They began pouring the concrete early in the morning. About eleven o'clock that morning the sky became overcast and intermittent

rain began to fall. The evidence showed that unless the concrete was completed in the footing before heavy rain set in, all of the previous work and material would be lost. That in order to speed up the work, Mr. Leadley got down into the hole to puddle and properly place the fresh concrete. The men on the ground above poured the concrete into the form as rapidly as Mr. Leadley could take care of it.

This work continued through the noon hour and until three o'clock that afternoon when it was completed.

Sometime after one o'clock P.M., Mr. Leadley felt a sharp pain in his left chest and noticed that he was short of breath; however, because of the urgency of the task, work was continued until the footing was completed.

That after completing the work down in the hole, Mr. Leadley lifte dthe concrete mixer by himself, which the evidence shows was a two-man job, and also lifted the water pump and the hose, which was also a two-man job. And he did this in order to get the mixer and the pump off of the highway.

That after completing the work, Mr. Leadley and the group ate their lunch. Mr. Leadley ate a few bites, but became ill and vomited what he had eaten. After eating their lunch the group started for their headquarters at Peoria, and Mr. Leadley was driving the truck; however, they had only gone a short distance when Mr. Leadley became violently ill and asked his helper to drive for him. By the time the truck had reached East Peoria, Mr. Leadley was so ill that the helper, in alarm, stogped at the office of the nearest physician, Dr. W. **A.** Lowy, for aid.

Dr. Lowy testified that he examined Mr. Leadley about 3:30 in the afternoon on November 10, 1947, and that from his examination he concluded that Mr. Leadley

had had a heart attack. That he had him removed to St. Francis Hospital in Peoria, Illinois, where he remained until December 15,1947. That a few days after Mr. Leadley was admitted to the hospital, Dr. Lowy had an electrocardiogram made, and a few days before he was sent home from the hospital on the first occasion, he had another electrocardiogram made. Dr. Lowy saw Mr. Leadley periodically through March and April of 1948, and he was again brought to St. Francis Hospital May 31st, where he remained through June 3rd and at that time was brought back because of paint fume poisoning. That on June 1, 1948 Dr. Lowy again took another electrocardiogram. That in the doctor's opinion the electrocardiogram shows that Mr. Leadley had sustained a coronary thrombosis on November 10, 1947 and that the future examination by the electrocardiogram showed his old heart attack, but nothing new. That in his opinion the only heart attack that Mr. Leadley ever sustained was the one on November 10, 1947. That in his opinion the coronary thrombosis which he found on November 10, 1947 was caused from over-exertion, and from the type of work he was doing on November 10, 1947. That the condition he found, relative to his heart, was permanent and that it would 'prevent Mr. Leadley from doing any manual labor.

The evidence shows that Mr. Leadley never had any previous physical trouble before, with the exception of minor cold ailments. That he took a physical examination when he applied for the State job and before he resumed work for the State. The evidence further shows that Mr. Leadley had worked hard all of his life and that the only kind of work that he ever performed was manual labor.

The facts show that Mr. Leadley returned to light

basis until November 23, 1948 when he was unable to continue work, and that he has not done any work since that time, either manual or otherwise.

The facts show that Mr. Leadley was paid compensation from November 10, 1947 until July 1, 1948. That he was again placed on compensation beginning November 23, 1948 until November 30, 1948, when he filed a claim with the Court of Claims.

The burden on the claimant was to prove that the physical disability of the claimant was the result of an accident arising out of and in the course of his employment. This rule is too well settled to require any extended citation of authorities, either in the Court of Claims, or by any other decisions of the State Court.

In this case the undisputed evidence is that Leadley's disability was caused by a coronary thrombosis. The proof, without question, shows that coronary thrombosis of the heart may result from over-exertion from manual labor. The record in this case shows that on the day in question, on November 10, 1947, Leadley had performed considerable extra work in the conrse of his employment. That because of rain the men working felt that all of their labor would be lost, and materials used in pouring the footing would also be lost, unless the work could be accomplished before heavy rain set in. That in order to speed up the work, Mr. Leadley got down into the hole himself and puddled the concrete, and took care of it as fast as the men poured it down into the form, and that this work continued on through the noon hour until sometime around 3 o'clock in the afternoon; and at that time Mr. Leadley, himself, lifted the concrete mixer and the pump and hose, which ordinarily was the work of two men, off the hard-road. This character of

work subjected Mr. Leadley bo unusual exertion. The unusual exertion, basically and logically, resulted in the condition as found by Dr. Lowy. Mr. Leadley suffered the attack at a place where the duties of his employment required him to be, and while he was in the discharge of those duties. There can be no question about this, as there is no dispute of these facts in the evidence.

In the opinion of the Court the facts in this case are almost identical with that set forth in *Fittro* vs. *Industrial Commission,* 377 Ill. page 532, where the Court on page 538-539 said:

"The evidence shows that over-exertion and fatigue is liable to induce and bring about acute dilation of the heart. The proof further shows that during the day preceding and up to the time of the accident, Fittro, in the discharge of his duties under his employment was subjected to unusual exertion and activity **of** a character which was calculated to bring about an acute dilation of the heart."

As said by this Court, in the *City of Joliet* vs. *Industrial Commission,* supra :

"The attack was suffered at a definite time and place and the cause of attack arose out of and in the course of the employment. This brings the case clearly within the definition of an accidental injury, within the meaning of the Act."

There is no dispute that statutory notice of the injury was given within the time required by the statute and that notice of and the filing of the claim was made within time.

From the additional medical testimony and other evidence in'support thereof at a hearing ordered by the Court on November 14, 1949, it is determined that claimant is permanently disabled at the present time.

After a careful consideration of the record, we conclude that the claimant is entitled to an award. We therefore make the following findings :

That the claimant and the respondent were on the 10th day of November, **1947,** operating under the provi-

sions of the Workmen's Compensation Act; that on the date last mentioned above, said claimant sustained accidental injuries; and that said accidental injuries arose out of and in the course of his employment; that notice of said accident was given said respondent and claim for compensation on account thereof was made on said respondent within the time required under the provisions of said Act.

That the earnings of the claimant during the year next preceding the injury were **$2,515.00.**

That the claimant at the time of his injury was 55 years of age and had no children under **16** years of age dependent upon him for support.

That all medical and hospital expenses and other. expenses have been paid by the respondent and there are no further claims made for such expenses.

The testimony on hearing before Commissioner Jenkins was transcribed by Mary **I.** Reynolds, who has submitted a statement of **$52.00** for her services. This charge is reasonable and proper.

The testimony on the last hearing before Commissioner Wise was transcribed by Mary **I.** Reynolds, who has a statement of **$58.40** for her services. This charge is reasonable and proper.

The claimant is, therefore, entitled to an award of **$5,200.00,** less the sum of **$92.96,** paid said claimant for non-productive time, or the sum of **$5,107.04.**

An award is therefore entered in favor of the claimant, Oliver Leadley, in the amount of **$5,107.04,** payable as follows :

$1033.50 being 53 weeks @ $19.50 per week, less $92.96 overpayment equals $940.54, which has accrued and is payable forthwith; and the balance of $4166.50 to be paid in weekly installments of $19.50 per week beginning December 14,

1949 for a period of 213 weeks with a final payment of $13.00,

And thereafter a pension for life in the sum of $416.00 annually, payable in monthly installments of $34.66.

Future payments being subject to the terms and provisions of the Workmen's Compensation Act of Illinois, the jurisdiction of this cause is specifically reserved for the entry of such other future orders as from time to time may he necessary.

An award is also macle in favor of Mary I. Reynolds for stenographic services in the total amount of $110.40, which is payable forthwith.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation award to State employees.''

(No. 4154—Claimant awarded $2,193.75.)

NELL MAE LEUTHOLD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 7, 1949.

IRVING M. GREENFIELD, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM J. COLOHAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award will be made under.* Where a supervisor in the laundry department of the Elgin State Hospital, while inspecting the operations of a broken press, got her left arm caught in the press which slammed down generating steam, requiring her arm to be pulled out and causing the upper layer of skin to be destroyed in the area burned, resulting in 50% loss of the use of her left arm, she was entitled to award therefor under the Act.

LANSDEN, J.

Claimant, Nell Mae Leuthold, 58 years of age, was employed by respondent on July 9, 1948, in the Elgin State Hospital, Elgin, Illinois, under the Department of Public Welfare. Claimant was one of two supervisors

in the laundry department of the institution and was in charge of about seventy patients who did the ironing of clothes by means of steam presses. On the above day, about ten o'clock in the morning, claimant had occasion to inspect and check the operation of a broken press which had just been repaired. She put a cloth on the bottom of the steam press and suddenly the top slammed down. Her arm was caught between the top and bottom half of the press. As the press clamped down it generated steam, burning claimant's left arm. The top half of the press locked in down position and would not raise. Her arm, pinned in the press, had to be pulled out.

Claimant was immediately hospitalized in the General Hospital, a section of the institution dedicated to treatment of acute surgical and medical problems of both patients and employees. She was confined there for five weeks after which she stayed at her home in Elgin, Illinois, where she continued to follow the instructions given her for application of medical dressings. On August **30,** when first able to resume her employment, she returned to work.

The upper layer of claimant's skin was destroyed in the area burned. Describing the treatment she received claimant stated that for the first nine days her arm was elevated in a pressure pack to keep the air away from the burn; during this time she was given penicillin. Thereafter she was required to soak her arm in a solution for a half hour each day and keep her arm in wet packs. Although considered, skin grafting was not accomplished. The burned area of her arm, evidenced by reddened skin and scar tissue, extended from a point about three inches below claimant's elbow to the tip of her fingers. In this area the only part of her skin not so affected was the small portion of her wrist which was protected

by a wrist watch. The most pronounced area of scar tissue on the top or back of her hand is characterized by a reddened smooth and glazed surface. Claimant described at night when her hand lies in a certain position her fingers go to sleep. She has difficulty in lifting objects with her left hand. She cannot make a fist or bend her fingers to enable the grip of small objects as in crocheting. She has not the requisite strength to handle heavier objects as a coffee pot. She said the weakness in her hand handicapped her as when shopping for groceries. Upon attempting to make a fist, claimant could not close her fingers further than about ¼ to ½ inch from her palm. She cannot oppose her left thumb to the other fingers of her left hand so that in picking up small objects she must use the side of her thumb against the side of her fingers.

Mrs. Leuthold told that since her injury the scar area of her hand becomes chapped and irritated by soap when washing and when handling wet clothes. She has noticed that in the last three months when touching a certain part of her arm near her elbow that she feels an irritation to the end of her fingers and that her fingers get to clenching. She said that during cold weather her hand aches and gets blue requiring her to wear a glove.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act and the accident arose out of and in the course of the employment. Respondent furnished complete surgical, medical, and hospital treatment.

The wages of claimant during the year next preceding the accident were $1,635.00, constituting a weekly wage in excess of $30.00 per week. At the time of the accident, claimant had no children under the age of 16 years and the only question for adjudication is the nature

and extent of the injuries to claimant's left arm resulting from the aforesaid accident. No claim for compensation is made on the grounds of temporary total disability, because a special pay formula was evolved for claimant which, in effect, paid this.

Two doctors testified in the case, one for each side. Their testimony in substance agrees as to the extent of claimant's loss of use of her left arm. It would serve no useful purpose to detail their testimony, which was clear, convincing and uncontradicted. Suffice it to say that on the evidence in the record, claimant has suffered a 50 per cent loss of use of her left arm.

Rothbart & Sewell, Court Reporters, were employed to take and transcribe the testimony before Commissioner Young. Charges in the amount of $83.50 were incurred for such services, which charges are reasonable and customary. An award is therefore entered in favor of Rothbart & Sewell for such amount.

An award is entered in favor of claimant, Nell Mae Leuthold, in the amount of $2,193.75, being at the rate, of $19.50 per week for a period of 112½ weeks, to be paid to her as follows:

$1,443.00, which has accrued and is payable forthwith;
750.75, which is payable in weekly installments of $19.50 per week, beginning on the 17th day of December, 1949, for a period of 38 weeks, plus one final payment of $9.75.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payments of compensation awards to State employees."

(No. 4164—Claim denied.)

MATIE P. HENDERSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opanion filed December **7,** *1949.*

FRANK R. EAGLETON AND JOHN F. MCGINNIS, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S *OCCUPATIONAL DISEASE* ACT—*where claim will be denied under.* Where attendant at Alton State Hospital contracted tuberculosis admittedly during her employment, but not due to negligence **of** the State, her claim will be denied. Citing *Wheeler* vs. *State,* **12** C. C. R. 254; *Domke* vs. *State,* 12 C. C. R. 452; *Norman* vs. *State,* **16** C. C. R. 128; *Odle* vs. *State,* **16** *C. C. R.* **183;** *McNutt* vs. *State,* 17 C. C. R. 18.

STATUTORY, VIOLATION OF *LIMIT* **OF** HOURS OF **LABOR** *as cause* ***of*** *injury where employment will not constitute violation.* Where an employee is attending classes after regular working hours, at which classes she was not in contact with tubercular patients, such attendance was not cause of her contracting the disease and no recovery can be had thereunder.

WORKMEN'S *OCCUPATIONAL DISEASE ACT—action must be brought within time specified in.* Where employee brings action after three **(3)** years as prescribed in Section **3 of** the Act no award will be allowed.

LANSDEN, **J.**

Claimant, Matie P. Henderson, seeks to recover from respondent under Section 3 of the Workmen's Occupational Diseases Act because she contracted tuberculosis while employed as an attendant at the Alton State Hospital. That she did contract tuberculosis is conceded, her condition having been diagnosed in 1947.

Claimant commenced work for respondent on January 3, 1944. At that time she was free of tuberculosis. Three times per week for twenty weeks after her employment commenced she was required to and did attend a one-hour instruction class for newly hired attendants, which class was conducted immediately after her eight

hour working day. Claimant alleges that this constituted a violation of Ill. Rev. Stat. 1949, Chap. 48, Sec. 5, which limits the hours of labor for females in State institutions to eight in any one day. We do not think it does, because her regular work was over and her exposure to tuberculosis patients had ceased when she went to class. Furthermore, it is inherent in the construction to be given to such statute that there must be some possible causal connection between the violation of the statute and the injury complained of. In this case, the chain of causation was lacking in vital links.

Her classroom work did not expose her to tuberculosis, and according to Claimant's Exhibit 2-C, chest X-rays taken of her in November, 1944, February, August and November, 1945, and February and May, 1946, showed no tuberculosis. Thus the proof in this case negatives conclusively any conclusion that claimant contracted tuberculosis from the violation of the eight-hour law if there was such a violation.

Section **3** of the Workmen's Occupational Diseases Act further provides that an "action for damage for injury to the health shall be commenced within three (3) years of the last exposure to the hazards of the disease. . . ." If a claimant chooses to rely on a statutory violation, the next logical step in the construction of Section 3 is that the action must be commenced within three (3) years of the last date upon which the statute was violated. This claimant has failed to do. Her instruction classes ended not later than May, 1945, yet her complaint herein was filed February 15, 1949.

Claimant testified that she wore a mask and gown at all times in the tuberculosis ward and that the ventilation in such ward was very good.

Claimant was off work for some time and was paid

by respondent at a reduced rate for her time off in accordance with a departmental policy. She returned to work in August, 1948, and her tuberculosis is now considered arrested and is no longer active.

Under the previous decisions of this Court, claimant has failed to establish her claim that she acquired tuberculosis as a result of negligence of respondent, and her claim must be and is hereby denied. *Wheeler* v. *State*, 12 C.C.R. 254; *Norman* v. *State*, 16 C.C.R. 128; *Domke* v. *State*, 12 C.C.R. 452; *Odle* v. *State*, 16 C.C.R. 183; *McNutt* v. *State*, 17 C.C.R. 18.

Hugo Antonacci, Springfield, Illinois, was employed to take and transcribe the testimony before Commissioner Summers. Charges in the amount of $56.70 were incurred, which charges are reasonable and customary. An award is therefore entered in favor of Hugo Antonacci for such amount.

(No. 4201—Claim denied.)

EDWARD P. NEIWEEM AND CALVERT FIRE INSURANCE COMPANY, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1950.

HENRY L. ARNOLD, Attorney for Claimants.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—*where member* ***will not be considered State empboyee so*** as ***to bind State for*** *injuries* ***to others by*** *members of.* Where a Chaplain on active duty with the Illinois National Guard, engaged in Summer training in Camp McCoy, Wisconsin, while driving a jeep which collided with an automobile driven by the complainant causing injuries, it was held that he was an agent of the United States of America and that the State was not liable for such injuries.

ILLINOIS NATIONAL GUARD—***when members are agents*** *of* ***the State or agents of the*** *United* ***States.*** Under 32 U. S. C. Sec. 20 officers of the National Guard while not on active duty are officers and employees of the United States, but not of the State. While functioning for and

within the State, they are agents of the State. (Citing Ill. Rev. Stat. 1949, Chap. 129, Section 1-210, 32 U. S. C., Sections 1-195 are paramount by virtue of the Constitution of the United States, Article 1, Section 8, paragraph 16.)

LANSDEN, J.

Edward P. Neiweem has filed his complaint in this Court seeking to recover for personal injuries and property damage allegedly sustained as result of a collision near Lacrosse, Wisconsin, between a motor vehicle driven by him and a jeep driven by a Captain Baird, a chaplain on active duty with the Illinois National Guard, who on the date of the accident, July **29, 1948,** was engaged in summer training maneuvers at Camp McCoy, Wisconsin, with the 33rd Artillery Division of the Illinois National Guard.

Calvert Fire Insurance Company, a Corporation, joins in Neiweem's complaint as a claimant by reason of a subrogation agreement between it and Neiweem, the company having paid to Neiweem the sum of **$472.65** for damages to Neiweem's vehicle as result of said collision.

Respondent has filed a motion to dismiss the complaint and the action on the ground that this Court has no jurisdiction of this type of claim.

Respondent relies on *Myers* v. *State*, 17 C.C.R. 55, to sustain its contention that this Court is without jurisdiction. That case held that a member of the Illinois Reserve Militia on active duty was not an employee of the State of Illinois and therefore the State was not responsible for his negligence, and the Court further construed the following language of Section 8 C of the Court of Claims Act "the negligence of its officers, agents, and employees in the course of their employment" as being limited to the master and servant relationship. A vigorous dissenting opinion was written by Judge Eckert in the *Myers* case, and we agree with Judge Eckert and do

hereby overrule the holding in the *Myers* case that a member of the Illinois Reserve Militia on active duty is not an officer, agent and employee of the State.

A person in the armed forces of the United States is an employee of the Government, 28 U.S.C., Sections 1346 (b), 2671; *Brooks* v. *U. S.*, 337 U. S. **49,** 93 L. Ed. 884. The interpretation that we have given to Section 8C makes the position of this Court, consistent with the Federal Tort Claims Act, 28 U.S.C., Sections 1346 (b), 2671-2680.

But does the overruling of portions of the *Myers* case benefit claimants in this case? Our inquiry must necessarily be directed now to the question of whether Captain Baird, under the facts alleged in the complaint, was an agent of the State of Illinois or the United States of America. We think and do so hold that Captain Baird, under the facts alleged in the complaint, was not an agent of the State of Illinois but on the other hand was an agent of the United States of America.

In reaching this conclusion, we have examined in detail the provisions of the statutes of Illinois relating to State Militia, Ill. Rev. Stat. 1949, Chap. 129, Sections 1-210, and we have compared that statute with the laws of the United States relating to the National Guard, 32 U.S.C., Sections 1-195.

By reason of Article **1,** Section 8, Paragraph 16, of the Constitution of the United States, which reads as follows :

> "To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress,"

the laws of the United States relating to the National Guard, **32** U.S.C., Section **1** et seq., are paramount.

For a State Militia to be subject to the Federal National Guard Statutes, it must have been federally recognized, 32 U.S.C., Sections 4, 4a and 4b. That the Illinois National Guard has been federally recognized is in this case certain by reason of the fact that summer training maneuvers were being conducted at Camp McCoy, Wisconsin.

Officers and enlisted men of the National Guard take a dual oath to obey the orders of the President of the United States and the Governor of the particular state, 32 U.S.C., Sections 112, 123, and this dual oath indicates that at certain times members of a State National Guard unit may be agents of the United States of America and at other times may be agents of a particular state. In fact, 32 U.S.C., Section 20, when compared with Section 194 leads to that conclusion. Said Section 20 reads as follows:

"Officers of the National Guard of the United States, while not on active duty, shall not, by reason solely of their appointments, oaths, commissions, or status as such, or any duties or functions performed or pay or allowances received as such, be held or deemed to be officers or employees of the United States, or persons holding any office of trust or profit or discharging any official function under or in connection with any department of the Government of the United States."

Said Section 194 reads as follows:

"No State or Territory or Puerto Rico or the Canal Zone shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under this title: *Provided,* That nothing contained in this title shall be construed as limiting the rights of the States and Territories and Puerto Rico and the Canal Zone in the use of the National Guard within their respective borders in time of peace: *Provided further,* That nothing contained in this title shall prevent the organization and maintenance of State or Territorial police or constabulary."

Since by Section 194 no state may order its National Guard used outside of its borders in time of peace, the Illinois National Guard while on summer training maneu-

vers at Camp McCoy, Wisconsin, in the summer of 1948 could only be under Federal jurisdiction and its members were, therefore, agents of the United States of America. July 29, 1948, for purposes of the National Guard, was a time of peace. 32 U.S.C., Section 164e; Cong. Res. July 25, 1947, Chap. 327, Section 3, 61 Stat. 451.

In view of the foregoing, the motion of respondent to dismiss the complaint and the action is hereby sustained and the action is dismissed.

(No. 4203—Claimant awarded $659.83.)

FLOSSIE BARBEE, ET AL., Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1950.

FRED L. WHAM, JR., Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS, UNPROTECTED EXCAVATION. IN—*where claim for damages* to automobile *occasioned* by will be allowed. Where the State Highway was undergoing repairs and *a* large excavation therein was obscured by a hill to drivers approaching **from** the other side and there were no flares maintained until after dark, and the claimant's car was damaged due to driving into the excavation, **an** award for such damages will be made.

DELANEY, J.

On October 20, 1948, claimant, Flossie Barbee, was the owner of a 1940 Dodge sedan automobile. On said date at approximately 5:45 P.M., said automobile was being driven by Wallace D. Barbee, son and agent of claimant, Flossie Barbee, in an easterly direction on the south side of a concrete highway known as U. S. Route No. 50, about one and one-half miles east of Odin, Illinois. Said highway was undergoing repairs and a large exca-

vation had been dug by the State of Illinois on the south lane at a point where the view of the highway was obscured to anyone approaching from the west by a slight rise in the pavement. The evidence shows that the agents of respondent did not put out flares until after dark and as a result the automobile in question was driven into the excavation where a fourteen foot portion of the pavement had been removed.

As a result of the negligence of respondent, claimant's automobile was damaged to the extent of $659.83. There was paid the claimant by the Protective Mutual Casualty Insurance Company the sum of $609.83 because of a collision policy which it carried on claimant's car and to which amount the company is entitled to reimbursement by reason of its right of subrogation under the policy. The claimant, Flossie Barbee, has not received reimbursement of the $50.00 damage sustained by her.

The record in this case consists of the complaint, departmental report, transcript of evidence, abstract of evidence, claimant's statement, brief and argument, additional abstract of evidence, respondent's statement, brief and argument and claimant's reply brief.

The evidence further shows that the claimant, Flossie Barbee, was the sole owner of the automobile which was damaged.

An award is, therefore, entered in favor of claimant, Flossie Barbee, for the sum of $50.00, and an award is also entered in favor of the Protective Mutual Casualty Insurance Company for the sum of $609.83.

(No. 4125—Claim denied.)

OLGA GAEBEL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 7, 1949.

Petztion of Claimant for rehearing denied February 14, 1950.

TALCOTT & TALCOTT (EDWARD M. BURKE, of Counsel), Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM J. COLOHAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—WORKMEN'S OCCUPATIONAL DISEASES ACT—*where award will be denied under.* Where an employee of the Division of Highways engaged in driving a snow-plow, at the conclusion of his days work, and upon arriving home complained of being ill; and a doctor was called the next morning, who diagnosed his trouble as a sore throat, found his temperature normal, and was vague and indefinite and uncertain as to the claimant's condition, such testimony is of doubtful probative value. He was taken to the Cook County Hospital where he died, and a death certificate admitted in evidence showed cause as cerebral thrombosis and made no reference to other disease. It was held that the complainant failed to show that the deceased sustained injury in an accident arising out of and in the course of his employment, or that he contracted the disease as an incident to his employment, said disease having been caused by the negligence of the respondent. Award was denied under both Acts.

EVIDENCE—*where failure to support hypothetical question with facts will be ruled out on objection.* Taken from the record the hypothetical question and the answer thereto, claimant's case fails.

LANSDEN, J.

Claimant, Olga Gaebel, widow of Frank B. Gaebel, deceased, seeks to recover from respondent under either the Workmen's Compensation Act or the Workmen's Occupational Diseases Act for the death of her husband.

Gaebel, aged 55, was, on January 4, 1948, employed in the Department of Public Works and Buildings, Division of Highways, for which Division he had worked continuously since April, 1941. On that day he performed his regular duties driving a snow plow. He worked from 10 A.M. to 8 P.M. with one-half hour at home for lunch,

His work that day was his usual winter work, and he sat in a heated cab while cleaning the snow from the highways. Nothing unusual happened in the course of the day except four or five cars were pulled out of snow drifts. At the conclusion of his day's work, Gaebel and his helper went to a tavern for a drink, Gaebel having a shot of liquor but not finishing his beer. Upon his arrival home, he complained of being ill. A doctor was called the next morning who diagnosed his trouble as a cold and sore throat. A gargle and sulfa drugs were prescribed. Gaebel's temperature was normal, and his doctor did not check his pulse, heart or blood pressure. The doctor was vague, indefinite and uncertain about Gaebel's condition except as to his sore throat. His testimony is of doubtful probative value. There was some testimony as to a pre-existing condition of nervousness for the year previous.

From January 5 till January 8, 1948, Gaebel stayed at home attended by his doctor. On the latter date, on his doctor's recommendation because of his inability to swallow normally, he was taken to Cook County Hospital in an ambulance. Gaebel died there on January 13, 1948.

It would serve no useful purpose for this Court to detail and weigh the evidence in point. To do so would extend this opinion to great lengths.

The testimony of the attending physician does not support claimant's theories of the case. The death certificate admitted in evidence showed the cause of death as cerebral thrombosis and contained no remarks as to associated diseases or other conditions, yet Gaebel had been taken to the hospital because of his sore throat.

Counsel for claimant asked a long hypothetical question early in the case, stating that before the hearing was closed all facts would be in evidence upon which such hypothetical question was based. Counsel took a

big chance and counsel lost. He never did get into evidence all of the facts that were required to make the proof under hypothetical question and amendments thereto proper. Respondent's objection was preserved and was well taken. Taking from the record the hypothetical question and the answers thereto, claimant's case falls. *Eckels* v. *Hulsten,* 136 Ill. App.; *Haish* v. *Paysouz,* 107 Ill. 365; *Hoxey* v. *St. L. & S. Ry.* Co., 171 Ill. App. 76.

Counsel for claimant in their brief argue at great length on the authority of *Mower* v. *Williams,* 402 Ill. 486, that Gaebel was engaged in a hazardous occupation and, therefore, entitled to the benefits of the Workmen's Compensation Act. That he was is no longer an open question in this Court. Each and every employee of the State is entitled to the benefits of the Workmen's Compensation Act. The leading case and one which directly decides this question is *Miller* v. State, 16 C.C.R. **194.**

But whether a case has been made out under the Workmen's Compensation Act is the question before us in this case.

The facts in the case do not disclose that claimant has sustained her burden and an award must be denied, under both the Workmen's Compensation Act and the Workmen's Occupational Diseases Act. Claimant has failed to prove that the deceased sustained an injury in an accident arising out of and in the course of his employment. *Crusan* v. *Ind. Com.,* 350 Ill. 407; *Fittro* v. *Ind. Com.,* 377 Ill. 532; *McKee* v. *State,* 10 C.C.R. 460. Claimant has likewise failed to prove that the deceased contracted a disease as an incident to his employment as a result of which he died, said disease having been caused by the negligence of respondent. *Domke* v. *State,* 12 C.C.R. 451; *Wheeler* v. *State,* 12 C.C.R. 254; *McNutt* v. *State,* 17 C.C.R. 18.

Conjecture and speculation form no basis for an award by this Court. *Reinertson* v. *State,* **17** C.C.R. 10.

A portion of this case has involved an attempt by claimant to have this Court determine her rights under the Illinois State Employees Retirement System. This Court is not the forum in which to raise such questions, since the statute provides for administrative proceedings, remedies and determination subject to judicial review under the Administrative Review Act, Ill. Rev. Stat. 1949, Chap. 127, Sec. 215-246, specifically Section 228a.

An award to claimant is denied.

Rothbart & Sewell, Court Reporters, 120 South LaSalle Street, Chicago, Illinois, were employed to take and transcribe the testimony before Commissioner Young. Charges in the amount of $58.75 were incurred, which charges are reasonable and customary. An award is entered in favor of Rothbart & Sewell for such amount.

This award is subject to the approval of the Governor in accordance with Section **3** of "An Act concerning payment of compensation awards to State employees."

(No. 4135—Claim denied.)

GREAT AMERICAN INSURANCE COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 23, 1949.

Petition of *Claimant* ***for*** *rehearing denied February 14,* ***1950.***

BARBER & BARBER, BY MR. HENRY R. BARBER, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

INSURANCE COMPANIES—*where money paid Director* of *Insurance* **as** *privilege tax cannot be recovered.* Where **an** insurance company has absorbed another, both doing business in Illinois, and the dissolved

company has paid required privilege tax to the Director of Insurance, which tax had been deposited with the State Treasurer, recovery of such tax cannot be had by the other company.

AVAILABLE APPROPRIATION—*how recovered from such.* Where there is appropriation in Department of Insurance the proper remedy is by law and the Court has no jurisdiction. (Citing *Adams* vs. *Nudelman, 375* Ill. **217** at 219.)

SCHUMAN, C. J.

The facts disclose that Great American Insurance Company owned 100% of the stock of the County Fire Insurance Company of Philadelphia, a Pennsylvania Corporation, except 20 director qualifying shares on which said company had the option to purchase.

Both of said companies had for many years done an insurance business in Illinois and had paid an annual privilege tax.

That said companies had an agreement dated July 1, 1947, which provided that all business of the County Fire Insurance Company was the business of the Great American Insurance Company, and that Great American received all of the premiums and were liable for all risks the same as if such policies had been issued in the name of the Great American .(Exhibit B).

That on April 8th, 1948 a reinsurance agreement was entered into by the parties and it is noted no cash consideration appears in said contract for transfer of said property. It is apparent the agreement was to be effective upon the dissolution of the County Fire Insurance Company.

That on April 14, 1948, a petition for voluntary dissolution was filed in the Court of Common Pleas No. 3 for the County of Philadelphia, Commonwealth of Pennsylvania, and on April 26th, 1948 a decree of dissolution was entered, but not to be effective until the Auditor General, State Treasurer and Attorney General had filed

certificates showing all taxes due to the Commonwealth of Pennsylvania had been paid and a certified copy of the decree filed and recorded in the office of the Secretary of the Commonwealth; that Exhibit 6 shows all of the requirements of said decree were met on June 1, 1948 and on August 9, 1948 a decree was entered approving the transfer of the assets of the County Fire to the Great American.

That the Director of Insurance of Illinois pursuant to a report of gross premiums received by the County Fire Insurance Company for the year ending December 31,1947, made an assessment of privilege tax against said County Fire Insurance Company in the amount of $4,289.29 for the privilege of doing business for the year conimencing July 1, 1948; that said Director about May lst, 1948 rendered to said County Fire Insurance Company a statement of said assessment and on or about May 17th said company paid to the State of Illinois said lax.

Exhibit No. 3 dated May 15, 1948 is the assessment of the privilege taken and is shown addressed to the County Fire Insurance Company and received by Great American Insurance Company, this exhibit showing tax due July 1, 1948 and objections to be filed, if any, by June 21st, 1948 at 9:00 A.M.

Exhibit 8 shows County Fire Insurance Company notified the Director of Insurance of Illinois on April 20, 1948, among other things, the following:

"This Company has filed a Petition for Voluntary Dissolution in the Court of Common Pleas for the County of Philadelphia, Commonwealth of Pennsylvania. The Great American Insurance Company of New York owns all of the Capital Stock of this Company and the Boards of Directors of both companies have voted to liquidate the County Fire Insurance Company. The purpose of this transaction is to simplify the corporate structure of the Great American Group."

"According to our records there will be due the State of Illinois,

taxes on premiums written during 1947 which we will be glad to pay before the dissolution if necessary. These taxes, pursuant to the reinsurance agreement, will become liabilities of the Great American *an addition to the tax which will accrue an premiums written in 1948 up to the date of complete liquidation.*"

Exhibit 9 shows a letter to the County Fire Insurance Company from J. Thor Wanless, Deputy Insurance Director, dated April 30, 1948, and showed received by Great American Insurance Company, and that upon receipt of a statement from a responsible officer of Great American that taxes on 1947 and 1948 business of County would be paid by Great American, the certificate of authority would be cancelled and a statement of taxes due was sent.

That the privilege tax paid by County Fire to the Director of Insurance was immediately turned over to the State Treasurer.

Claimant contends that the privilege tax paid by County Fire for the year commencing July 1, 1948 never became due and payable and said amount is recoverable under the provisions of Sec. 412 (4) of the Illinois Insurance Code.

A great deal of time has been spent on the question of whether the tax was paid voluntarily, or under protest. The cases cited and argued are in the main devoted to situations where a tax is paid voluntarily and no statutory provisions exist for repayment. In such cases the courts have denied relief.

However, in cases where statutes contemplate a refund or other provisions are set up for credits, where tax overpayments have been established, the courts have held that it did not make any difference whether payments were made voluntarily and without protest, and whether the mistake was one of fact or of law. These cases, however, are construed in accordance with the

particular statutory provision. In the cases allowing refunds appropriations had been set up by the departments to cover such situations.

In the instant case there is no evidence of any appropriation available in the Department of Insurance, and, if there was, petitioner would have an adequate remedy at law and this Court would have no jurisdiction.

In the case of *Adams* vs. *Nudelman*, 375 Ill. 217 at page 219, it is held:

"No case from this court is cited, and we apprehend that none can be, where the State Treasurer and State Auditor have been compelled to pay money out of the treasury without any appropriation therefor, and it is admitted there is no appropriation applicable to this case.

No matter by what name this suit may be called it is, in substance and in necessary effect, a suit against the State and section 26 of article 4 of the constitution provides that the State of Illinois, shall never be made defendant in any court of law or equity.

The constitution also provides in section 7 of article 9 that all taxes levied for State purposes shall be paid into the State treasury. This last provision is implemented by the State Government act (Ill. Rev. Stat. 1939, chap. 127, par. 171) which requires every board, commission or department collecting money on behalf of the State to pay the same into the State treasury not later than the next day after collection, disregarding holidays and Sundays. The next section following that above mentioned provides a means whereby a taxpayer may, by notice to the State Treasurer, make payments under protest, in which event the money shall be kept in a protest fund for a period of thirty days during which an injunction or restraining order may be sought for testing the validity of the tax, and providing that such fund shall be held until the final order of the court. Plaintiffs did not comply with this statute, did not make payment under protest and admit that the moneys they paid have long since been paid to the State Treasurer."

There is no dispute that the tax in this case was voluntarily made. The petitioner, or the County Fire Insurance Company, had a remedy under Chapter 127, Paragraph 172, Illinois Revised Statutes (State Bar Edition) (*Adams* v. *Nudelman*, supra; *Farm Bureau Oil Co. Inc.* vs. *State of Illinois*, 14 Court of Claims Reports, 153 at 155.)

Under the decisions of our courts the money having been paid into the State Treasury, and no appropriation being applicable for the refund in this case, the claim will have to be denied. (*Adams* v. *Nudelman*, supra.)

We have carefully considered the decisions cited by claimant, and find that said cases are not in point.

Another reason why the claim will have to be denied is that in effect the County Fire Insurance Company became merged with the Great American Insurance Company, and under Section 409, sub-paragraph (3) of the Insurance Code, the tax is deemed paid by said Great American Insurance Company. Claimant contends contract between County Fire and claimant evidenced a sale and did not operate to effect a merger or consolidation.

The reinsurance agreement contemplated a dissolution of the County Fire, and was definitely predicated thereon. Exhibit 8 showed the purpose of liquidating the County Fire was to simplify the corporate structure of the Great American. The reinsurance agreement itself showed that as of July 1, 1947 all policies issued by County Fire were in effect policies of the Great American and Great American received all of the premiums.

Great American, it is admitted, owned and controlled all of the stock of the County Fire. By whatever technical construction yon view the transaction it was simply an absorption by the Great American of something it already owned and controlled and to thereafter operate the two enterprises as one.

In *Gunggall* v. *Outer Drive Athletic Club*, 349 Ill. 406, the court on page 413, said:

"A consolidation of corporations has been defined to be a merger, a union or an amalgamation by which the stock of the two corporations is made one, by which their property and franchises are combined into one, by which their powers become the powers of one, by which their names are merged into one, and by which the identity of two prac-

tically, if not actually, run- into one. This was the definition formulated by the Supreme Court of Montana after an exhaustive examination of *a* great many adjudicated cases and text books and a consideration **of** *a* large number of constitutional and statutory provisions **of** the different States, in *State* vs. *Montana Railway Co.*, 21 Mont. **221."**

On pages 414 and 415 of the same opinion, the court quoted from the case of *Chicago, Santa Fe & California Ry.* Co. v. *Ashling,* 160 Ill. 373, as follows :

"It was said that "it is true that what was done must be considered in order to determine whether there was *a* consolidation or not, but we must look to the results accomplished, rather than to the means, steps or procedure by which those results have been attained." The fact was then referred to as going far toward stamping the transaction as one of consolidation, that in addition to the consideration of one dollar to be paid by the Santa Fe company and the assumption and payment of the bonded indebtedness **of** the St. Louis company, the Santa Fe company was to issue its stock to the stockholders **of** the Santa Fe company, dollar for dollar, in exchange for its stock in the latter company. The effect of this was to incorporate in the Santa Fe company the stockholders of the St. Louis company, combining all the stockholders of each company in one. "This," the court said, "was an act of consolidation and not by any means necessary to *a* mere purchase and sale. * * * * By the transaction the St. Louis company was left without property, corporate rights or franchises of any kind, and without stockholders. All of these were transferred bodily to the Santa Fe company, and became united, respectively, with the property, rights, franchises and stockholders of the latter company. Why was this not a consolidation **of** the St. Louis company with the Santa Fe company? There is no magic in words. Merely calling the transaction *a* purchase and sale would not prevent it from being *a* consolidation. It cannot be supposed from the nature of this transaction that it was expected that the St. Louis company should continue its active corporate existence after divesting itself of all its property, corporate rights and franchises and stockholders."

In the case cited by claimant, *Morris* v. *Interstate Iron & Steel* Co., 257 Ill. App. 613, at page 620, the court said :

"The contract alleged in the present bill is not one by which two corporations agree to go out of existence and permit a new corporation to succeed to their corporate rights and franchises, nor is it one where one corporation is continued and the other merged, but it is **a** sale by one corporation **of** its property and assets to another, both corporations continuing to exist. The Illinois corporation did not agree to transfer its corporate franchise to the New **York** corporation, nor could it **sell**

its franchise. (See *People* vs. *Union* Gas *Co.*, 254 Ill. 395, 404.) Nor was the Illinois corporation dissolved by the sale of all of its property."

There is no law submitted as to legal requisites of merger with reference to Pennsylvania or New York.

Fletcher on Corporations, Vol. 15, Sec. 7041, provides :

"Strictly speaking a merger means the absorption of one corporation by another, which retains its name and corporate identity with the added capital franchises and powers of the merged corporation. It is the uniting of two or more corporations by the transfer of property to one of them, which continues in existence, the other being merged therein."

"Sec. 7046: * * * * there is no merger or consolidation merely because the stockholders of two corporations are largely or wholly the same, * * * *. Such stock ownership and control may, however, when taken in connection with other circumstances force the conclusion that there has been a merger of the companies, and the legal fiction of distinct corporate existence will be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, *as to make it merely an instrumentality or adjunct* of *another corporation.*"

The words of the reinsurance agreement and the true intent and purpose of the contracting parties determines whether or not a merger was contemplated. (C. *& E. I. R. R.* Co. vs. *Doyle,* 256 Ill. 517.)

The stipulation of facts does not set forth the petition to dissolve the County Fire, nor the complete proceedings relating thereto.

The reinsurance agreement, as stated, required the County Fire to be dissolved and upon its dissolution

(No. 4136—Claim denied.)

ELWYN H. TROTH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1950.

L. RICHARD WHITNEY, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where award will be denied under.* Where an employee of the Division of Highways while standing on a truck holding rolls of snow fence, when truck stopped suddenly fell to the pavement and claimed a hernia as a result of such fall, and the evidence showed that the hernia developed from a scar remaining after a previous operation for a ruptured appendix in connection with which drains had to be used because of peritonitis with abscess. Held that the claimant did not make the necessary proof as required by Section 8 (d-1) of the Act, and was not entitled to award thereunder.

WORKMEN'S COMPENSATION ACT—*elements of proof necessary to justify award for hernia under the Act.* (1) the hernia was of recent origin; (2) its appearance was accompanied by pain; (3) that it was immediately preceded by trauma arising out of and in the course of employment; (4) that the hernia did not exist prior to the accident. (Citing *O'Gara Coal Co.* vs. *Industrial Commission*, 320 Ill., 191.)

DELANEY, J.

Claimant, Elwyn H. Troth, was employed on November 26, 1947, as a highway section man's helper in the Division of Highways. On that day while riding on a truck owned and operated by the Highway Department of the State of Illinois, claimant and another employee stood in the truck to hold two rolls of snow fence when the truck stopped suddenly causing claimant to fall to the pavement. The claimant injured his right side and claims injury to his head, right arm and side. Two or three weeks after the accident claimant was suffering from a hernia which developed on the edge of a scar resulting from an operation for a ruptured appendix. At the time of the appendix operation drains had been placed in the claimant's abdomen because of peritonitis with abscess. On August 17, 1948, an operation was per-

formed on claimant by Dr. E. C. Burhans, assisted by Dr. A. H. Clark, to repair the hernia in question.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act.

The record consists of the complaint filed November 24, 1948, departmental report, transcript of evidence, motion of claimant for a further extension of time in which to file testimony.

Dr. E. C. Burhans made a charge of $150.00 to the claimant for the operation. This amount included fee for assistance by Dr. A. H. Clark. The claimant incurred an additional expense of $122.00 hospital bill and $10.20 drug bill to Sutliff and Case. Following his operation the claimant was paid for the remainder of August and for the month of September, 1948, in the amount of $267.10.

Under Section 8 (d-1) of the Workmen's Compensation Act of Illinois, an injured employee, to be entitled to compensation for hernia, must prove:

1. The hernia was of recent origin;
2. Its appearance was accompanied by pain;
3. That it was immediately preceded by trauma arising out of and in the course of employment;
4. That the hernia did not exist prior to the accident.

In the case of *O'Gara Coal* Co. v. *Industrial Commission,* 320 Ill. 191, the Supreme Court said:

"Post-operative hernia, which appears in a very considerable percentage of cases, where an operation has been performed and there has been drainage through the abdominal wall for a considerable length of time; that the injury hastened it; that it would have occurred by the normal pressure of the abdominal contents from the inside out, gradually stretching the scar tissue; that the hernia would keep on getting larger."

Although claimant did no productive work following

his operation, during the remainder of August and the full month of September, 1948, he was paid full salary in the amount of $267.10.

From the evidence, we must conclude that claimant elected to secure his own physician. Under Section 8, Par. (a) of the Workmen's Compensation Act, this service, under such conditions, necessarily must be at his own expense.

Award denied.

The testimony on the hearing before Commissioner Summers was taken by Emma Bowers, who has submitted a statement for $25.00 for her service. This charge is reasonable and proper.

An award is, therefore, made in favor of Emma Bowers for stenographic and reporting services in the amount of $25.00, which is payable forthwith.

(No. 4142—Claim denied.)

ELLA CUSHMAN, WIDOW, ET AL., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opanion filed July 8, 1949.

Petztion of Claimant for rehearing denied September 23, 1949.

Motion of Claimant for new trial denied February 14, 1950.

FRANK R. EAGLETON, Attorney for Claimant.

IVAN **A.** ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where award wall be denied under.* Where an employee of the Department of Public Works and Buildings, engaged as a chauffeur for the Director of the Department, suffered a heart attack while talking to a mechanic at a Service Station, collapsed and was pronounced dead upon arrival at hospital, it was held that inasmuch as the evidence failed to show that the character **of** work was not unusual or heavy and that the attack was due to an accident wliile so engaged, no award would be allowed.

LANSDEN, J.

Ella Cushman, widow of Clyde E. Cushman, deceased, seeks to recover under the Workmen's Compensation Act for the death of her husband, allegedly as a result of aggravation of a pre-existing heart condition, while in the employment and performance of his regular duties for the Department of Public Works and Buildings of the State of Illinois. With the exception of five months in 1942 and four and one-half months in 1944, decedent had worked continuously for respondent since 1921.

Clyde Cushman was chauffeur for Mr. Walter A. Rosenfield, Director of Public Works and Buildings of the State of Illinois, and as such on November 5, 1948, he drove Mr. Rosenfield from Springfield, departing about 1 P.M., to the latter's home in Rock Island, Illinois, and immediately returned to Springfield.

Mr. Rosenfield testified khat Clyde Cushman was not suffering in any manner on the trip to Rock Island and that he did not complain of anything and did not look like he was suffering. The last time that Mr. Rosenfield saw Clyde Cushman was between 4 and 4:30 P.M. when Mr. Rosenfield got out at his home and Clyde Cushman started back to Springfield.

Claimant herein testified that Clyde Cushman had been under the treatment of a heart specialist in St. Louis for about two years prior to his death and that he had a slight coronary thrombosis accompanied by slight high blood pressure. She also testified that Clyde Cushman had not taken any medicine for a long time and had not seen a doctor about his heart condition since August, 1948.

Dr. Robert Flentje, whose qualifications were admitted, in answer to a hypothetical question, stated that

a person might in driving a long time in one day aggravate a heart condition with possible fatal effect. Dr. Flentje had never examined the decedent, but did categorically state that a coronary thrombosis usually causes death.

The departmental report filed herein contains some statements, contradicted by the oral testimony of Mr. Rosenfield, to the effect that the car Clyde Cushman was driving was not operating properly and that he appeared somewhat unnerved at Rock Island. All of the facts relating to what transpired immediately prior to the death of Clyde Cushman are set forth in the departmental report, which reads in part as follows:

"Mr. Cushman left Rock Island at about 4:30 P. M. and arrived at the State Central Garage, Second and Ash Streets, in Springfield, at 8:25 P. M. It was his custom to make the return trip in three hours without stopping for dinner or gasoline service. He was to deliver a message from Director Rosenfield to a guest at the Abraham Lincoln Hotel at approximately 9:15 P. M.

"Upon arrival at the garage he parked the State car on Ash Street and went into the garage. There he secured a bar of candy from a vending machine and engaged the night mechanic, Mr. W. T. Wilkins, in general conversation. After being in the garage about ten minutes, Mr. Cushman complained about feeling "awful" and was 'about to slump to the floor. Mr. Wilkins being nearby, caught Mr. Cushman as he was in the act of falling and lowered him gently to the floor. This event occurred near the front of the garage in the driveway area between the gasoline pumps and the shop foreman's desk.

"The city ambulance was called and responded in about ten minutes. **On** arrival at the hospital Mr. Cushman was pronounced dead."

Although briefs were waived by the parties hereto, and the Court has therefore not been afforded the benefit of the views of counsel herein, a rather thorough search of the cases involving death or disability from heart trouble has been made, and the Court has reached the conclusion that under the facts disclosed by this record, an award would not be justified in this case.

Throughout the cases examined runs a carefully de-

lineated distinction depending on the existence or non-existence of pre-existing heart disease.

A long line of cases hold that where there is no showing of pre-existing disease and an employee while at work, usually of a heavy nature or involving unusual exertion or strain, suffers a heart attack, such attack is held to be an accidental injury arising out of and in the course of employment under the Workmen's Compensation Act. *Marsh* v. *Ind. Corn.,* 386 Ill. **11,** is a recent case wherein are reviewed many of the cases falling in this category.

However, in this record there is uncontradicted testimony that decedent had previous heart disease, and the rule in such cases is that compensation may be awarded although there is a pre-existing disease if the disease is aggravated or accelerated by an accidental injury in the course of employment. There must, however, be an accidental injury as the immediate or proximate cause of death, *Chicago & Northwestern Ry. Co.* v. *Ind. Corn.,* **341 111.131;** *Hahn* v. *Ind. Corn.,* **337** Ill. *59;* *Jakub* v. *Ind. Corn.,* 288 Ill. *87.*

In *Fittro* v. *Ind. Conz.,* 377 Ill. **532,** the Supreme Court of Illinois has very clearly set forth the distinction above referred to in heart disease cases, and the court at page 537 said:

"This case is entirely different from the line of cases in which the death was caused by organic heart trouble or other pre-existing disease. As pointed out by this court in the case of *Jacob* vs. *Industrial Corn.,* 288 Ill. 87, where the death was caused by a pre-existing disease, it must be shown that the disease was aggravated and accelerated by an accidental injury sustained in the course **of** the employment. (*Peoria Railway Terminal Co.* vs. *Industrial Board,* **279** Ill. **352.)** Where there is a pre-existing disease, in order to bring the case within the rule, there must be an accidental injury as to the immediate, or proximate, cause of death. The statute provides compensation for accidental injuries, or death, suffered in the course of employment. An accidental injury is one which occurs in the course of the employment, unexpect-

edly and without the affirmative act or design of the employee. It is, something which is unforseen and not expected by the person to whom it happens. (*Matthiessen & Hegler Zinc Co.* vs. *Industrial Board,* 284 Ill. 378.) Thus, in the pre-existing disease cases, the evidence must show an aggravation, or acceleration, of the disease, by some accidental injury. That role, however, does not apply to a case * * * where no pre-existing disease is shown to exist."

The facts in this case disclose that Clyde Cushman had finished his driving for the day and had, with the exception of delivering a message to the Abraham Lincoln Hotel for Mr. Rosenfield, to all intents and purposes ceased working for the day. In *Philadelphia Reading Coal & Iron* Co. v. *Ind. Corn.,* 334 Ill. 58, deceased had been working for some months in a coal yard loading coal in the wagons or putting it in bags weighing about one hundred pounds, which were then loaded by men into the wagon. The deceased worked on the day of his death until the regular quitting time, walked about a hundred yards to his home, sat down on a box on the porch, remarked that he did not feel well, and shortly thereafter fell off the box and soon died. He died of heart disease, which had been diagnosed about seven months prior. The court held that compensation could not be awarded, and at page 62 said:

"There is no evidence in the record of any unusual exertion or strain on the part of Merek shortly before his death. The work he did on the day of his death, while heavy work, was such as he usually did in the course of his employment. Furthermore, he did not collapse while at work, but after having finished the job on which he was working, without any complaint of injury or sickness and with apparently nothing the matter with him, walked two hundred and ten feet or more and sat-down before he collapsed."

The Court is of the opinion that the facts as disclosed in the record of this case are governed by cases above referred to, and that an award must be and is therefore denied, there being no showing of "an accidental injury to the employee resulting in death" within

the meaning of the first paragraph of Section 7 of the Workmen's Compensation Act.

Hugo Antonacci, Illinois National Bank Building, Springfield, Illinois, was employed to take and transcribe the evidence before Commissioner Jenkins, and a charge of $28.30 was incurred for this service, which is reasonable and customary, and an award for such amount is hereby entered in favor of Mr. Antonacci, which is payable forthwith.

(No. 4150—Claim denied.)

BARBARA VORIS MERKLE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 7, 1949.

Petition of Claimant for rehearing denied February 14, 1950.

JOSEPH D. RYAN, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—*where there was no proof of.* Where a guest at the Governor's Mansion claimed to have received injuries due to tripping on the staircase; that the carpeting thereon was allegedly loose and the lights too dim to see the loose carpet *edge* although her mother, an elderly woman, had seen it, it was held that there was no proof of negligence by the State and there could be no recovery.

SCHUMAN, C. J.

The facts disclose that the claimant, together with her mother, Leona Merkle, were house guests of Mrs. Green, wife of Governor Dwight H. Green, at the Executive Mansion in Springfield, Illinois, on May 9, 1948.

Claimant testified that she was a reporter for the Chicago Tribune; that around 12:30 in the morning she went to Gloria's room, the daughter of the Governor, to get some phonograph records, this room being on the second floor, and that was the last thing that she re-

membered with reference to the accident. There was no testimony on her part as to the condition of the stairway, the carpet or the flooring.

Leona Merkle, the mother of the claimant, testified that the accident occurred between 12:30 and 1:00 in the morning; that her attention was attracted when her daughter fell over the balustrade; that prior to the accident she had occasion to inspect the condition of the steps when she came down for dinner; that she testified that the railing was about 3½ feet high; that the carpet was loose, that a little piece was sticking up on the carpet not more than an inch or an inch and a half on the first step; that the floor to the side of the carpet was highly polished, and that the stairs were steep; that there was subdued lighting from the light at the top of the stairway with a frosted globe and one at the foot of the stairway; that there was a very large chandelier, but when the family was not home it was not on and that the rise in the carpet was at the edge on the first step after leaving the second floor landing.

Helen Vandiver testified that she was employed at the Executive Mansion for six years, and that she had general care and the duty of maintenance in the Executive Mansion; that she had known the claimant for five years and that her habits were good for being careful and cautious; that the rugs were vacuumed every day; that about three times the rugs came loose and that the tacks would come out and that Louis Harvison was the one who put the tacks back; that the rug did not become uneven, but just loose, and you could put your hand under it; that at the top of the stairway the light was on the wall across from the stairs and that there was a light in the dome, and that without the dome light the lighting was not good; that no one had fallen on this par-

ticular stairway and that the carpeting was in good shape and that she didn't know that the carpeting was loose on May 9th, and didn't notice any wrinkles in the rug at the time of the accident, and that she had been on the stairway preceding the accident and didn't notice anything unusual in the condition of the stairway; that the claimant had been a house guest at the Mansion before on several occasions and at least more than once a year; that the claimant had been up and down the same stairway on various occasions both in the daytime and at night.

There can be no question from the facts in this case, and from the law applicable thereto, that the State retained control of the Governor's Mansion for the purpose of maintenance and upkeep. The claimant contends in such a situation that it is comparable to a landlord and tenant relationship. She further contends that invitees, such as herself, while upon the premises of the Mansion are entitled to the exercise of due care on the part of the property owner for their protection. In support of this last contention she cites the case of *Fisher* v. *Jansen,* 30 Ill. App. page 91, which involved a suit against the owner of a building by a person stopping with one of the tenants. The appellee was injured by walking through the open door of an elevator shaft in the building, while the elevator cab was above, and the person fell into the pit below. The owner of the building employed the person in charge of the elevator. The court on page 93 held:

"The proprietors of such houses could hardly expect to find tenants for and profit from their buildings, if they imposed unreasonable restraints upon the social life of the tenants. The proprietor invites tenants, and thereby impliedly invites the persons who are properly visitors or guests of the tenants, and they come within the protection of the principle that a person, while upon the premises of another by invitation, express or implied, is entitled to the exercise of due care

on the part of the property owner for his protection. Thompson, Meg., 313; *Bennett* vs. *R. R.*, 102 U. S. 577; *Hayward* vs. *Merrill*, 94 Ill. 349."

The Court finds no fault with the rule of law enunciated in the Jansen case, but each particular case is governed by its own set of facts.

It can be conceded that, insofar as the maintenance of the stairway is concerned, said stairway was under the control of the State. Under such circumstances it was the duty of the State to see that said steps were properly maintained. The question then resolves itself to the point, was the State guilty of negligence in the maintenance of said stairway and was such negligence the proximate cause of the injuries to claimant.

It cannot be concluded from the evidence that the construetion of the stairway had anything to do with the injury in question. The stairway in its construction was known to the occupants of the Mansion, being the Governor and his family, and in fact, according to the testimony, has been in that same state of construction since the year 1885. The evidence does not show that the stairway was negligently maintained. It is apparent that the claimant was not a stranger, but had visited the Mansion many times and was familiar, not only with the construction of the stairway, but the carpeting and lighting, and general nature of said stairway. Under similar circumstances if the Governor was injured by falling down the stairs, or members of his immediate family, a recovery could only be had against the State for a defective condition of which the State had notice. The fact that the claimant was an invitee does not make the State an insurer for any injuries that she might sustain.

The State would be liable if it had failed to keep the stairway in repair, and can only be charged with negligence for such failure after notice of the existence

of the dangerous condition, or after the defect has continued for a sufficient length of time to charge it with constructive notice.

Even in the cases where the landlord reserves control over parts of the building and premises used in common by all tenants, and where it is held he is under the implied obligation to use reasonable diligence to keep in a safe condition the part over which he so reserves control, it is found that the landlord can only be charged with negligence for failure to repair after notice of the existence of the dangerous condition of the same, or after the defect has continued for a sufficient length of time to charge him with constructive notice thereof. *Burke* v. *Hulett,* 216 Ill. 545, page 550. *National Builders Bank* v. *Schuhan,* 319 App. 546 at 552.

One of the conditions complained of by the claimant was that there was improper lighting on the stairs. Leona Merkle, mother of the claimant, testified, as shown on page 13 of claimant's brief, that following dinner she used the stairs and that she noticed that on the edge of the first tread down from the platform near the railing, the carpet was loose. This definitely shows that Leona Merkle, an elderly woman who contended that her eyesight wasn't good, could see a small rise in the carpet and apparently the light was sufficient for this purpose.

As to the hand railing, this was a condition fully known and not concealed, and in the Court's opinion cannot be used for a basis of recovery.

There is no testimony in the record that the Governor or his wife had complained about the condition of the floor, the carpet, the railing or other facts concerning said stairway. On the contrary it is shown that the carpet was vacuumed every dag and that there were no defects of any kind observed immediately after the acci-

dent with reference to any defective condition in the carpet.

As to how the injury occurred, whether the claimant slipped, tripped or fell, we do not know. The Court does not feel that it is necessary to go into the question as to whether the claimant was in the exercise of due care and caution for her own safety, for the reason we feel that there has been no proof of negligence on the part of the State, and certainly no negligence that was the proximate cause of the injury. The evidence wholly fails to show a defective condition which the State was liable for, and without any notice proven of any defective condition on the part of the State, this element of proof being entirely lacking, the claim is denied.

(No. 4156—Claimant awarded $2,354.00.)

GEORGE RICHARDSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 23, 1949.

Supplemental opinion filed February 14, 1950.

NEIL H. THOMPSON, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where award will be made under.* Where an employee of the Department of Conservation, while catching pheasants for liberation, a pheasant flew up and hit him in the right eye bruising the eye and causing internal hemorrhages, resulting in reduction of vision to 6/200ths, which would be industrially blind and his loss of vision is permanent, he was awarded $2,340.00 therefor and $14.00 for doctors' services employed by him.

DELANEY, J.

Claimant, George Richardson, was employed on October 1, 1948, by respondent in the Department of Conservation. On that day, while catching pheasants for lib-

eration, a pheasant flew up into his face and struck him in the right eye, bruising the eye and causing internal hemorrhage. Claimant was taken to the office of Dr. J. A. Johnson in the City of Mt. Vernon, Illinois, immediately after the accident.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment. The claimant incurred doctor bills due Dr. J. A. Johnson in the amount of $14.00, which are unpaid. The only other question is the extent of permanent disability suffered by claimant.

Dr. J. A. Johnson attended the claimant. He testified that on the day of the accident he examined the claimant and found the anterior chamber of the right eye was filled with blood and sub-confindivial hemorrhage due to injury, he had complete loss of vision at that time, the blood shut off all light. Dr. Johnson treated claimant for two weeks. There was blood from the injury on the inside of the eye which was gradually absorbed but causing retinitis which affected the nervous coat of the eye. At a later date Dr. Johnson examined his vision and found that claimant's vision was at that time 6/200ths which would be industrially blind and that his loss of vision is permanent.

Claimant on October 1, 1948, was married but did not have any children depending upon him for support. His total earnings for the year preceding his injury were $2,100.00. His compensation rate would, therefore, be $15.00 per week, increased by 30% to $19.50 per week, the accident having occurred after July, 1947. From the record claimant is not entitled to temporary total disability. He is entitled to receive the sum of $2,340.00 for

the loss of the sight of his right eye, computed on the basis of 120 weeks at $19.50 per week.

The Court finds that claimant has permanently lost the sight of his right eye and that he is entitled to an award of $19.50 per week for a period of 120 weeks.

An award is, therefore, hereby entered in favor of claimant, George Richardson, in the amount of $2,340.00, payable as follows:

$975.00 which has accrued and payable forthwith.
$1,365.00 payable in weekly installments of $19.50 for 70 weeks.

Claimant is also entitled to be reimbursed in the sum of $14.00 due Dr. J. A. Johnson for his services, which is still unpaid.

An award is also made in favor of claimant, George Richardson, in the amount of $14.00, the sum due Dr. J. A. Johnson for his services, payable forthwith.

The testimony taken at the hearing before Commissioner Jenkins was taken and transcribed by Gladys Berg, who made charges therefor in the amount of $15.60. These charges appear reasonable and proper.

An award is, therefore, made to Gladys Berg in the amount of $15.60, payable forthwith.

Future payments being subject-to the terms and conditions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such orders as may from time to time be necessary.

An award is also entered for the sum of $100.00, payable to the Treasurer of the State of Illinois.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

SUPPLEMENTAL OPINION

It being represented to the Court that the award for the one hundred dollars ($100.00) payable to the Treasurer of the State of Illinois under the Special Fund was ineffective at the time that the original opinion was granted.

It is therefore ordered by the Court that the original opinion be modified by striking therefrom "An award is also entered for the sum of one hundred dollars ($100.00) payable to the Treasurer of the State of Illinois".

(No. 4157—Claimant awarded $2,386.00.)

COUNTY OF RANDOLPH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion *filed* February *14, 1950.*

JOHN **A.** HEUER, State's Attorney, Attorney for Claimant.

IVAN **A.** ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HABEAS CORPUS—Expenses *incurred by* County when allowed. Where a County incurs expenses, costs and fees in habeas corpus proceedings brought in such counties, involving non-residents of such counties who may be confined in State penal or charitable institutions, the County may be reimbursed **for** such expenses, costs, and fees in accordance with the provisions of Sections 37, 38 and 39 of Chapter 65 of the Illinois Revised Statutes (1947).

LANSDEN, **J.**

Claimant, County of Randolph, Illinois, by the chairman of its Board of County Commissioners and its State's Attorney, filed its complaint on December 30, 1948, seeking recovery from respondent of the sum of $2,549.20.

Claimant's action is based on a specific statute which

confers jurisdiction upon the Court to hear cases under such statute. Ill. Rev. Stat. **1947,** Chap. **65,** Sees. **37-39;** Chap. **37,** Sec. **439.8.**

Previously the Court granted an award in another case under the same statute, *County* of *Will* v. *State,* No. **4104,** opinion filed April **19, 1949,** and in its opinion the Court set forth the substance of the applicable sections of the statute involved which will not be repeated in this opinion.

Suffice it to say that the purpose of the specific statute is to reimburse Illinois counties wherein are located State penal or charitable institutions, for the expenses, costs and fees incurred by reason of the continuing flood of petitions for habeas corpus that are filed in such counties by non-residents of such counties. The statute applies primarily to the Counties of Will and Randolph, and allows such counties to recover fees and expenses incurred. The cases naturally involve positions *in. forma pauperis.*

After the original hearing before a commissioner in the case, the Court, on its own motion, remanded the case to another commissioner to take further testimony on certain aspects of the case which the Court felt should be developed by further proof.

Between the dates of July 18, **1947,** and December **1, 1948,** there were filed in the office of the Clerk of the Circuit Court of Randolph County, **178** petitions for writs of habeas corpus by inmates of the Illinois State Penitentiary. None of those petitioners were at the time of their commitment residents or committed by any court of Randolph County, and all proceeded as poor persons under Rule **39** of the Rules of the Circuit Court of Randolph County. The Clerk of the Circuit Court, therefore, should have been paid the sum of $890..00, since his fee

for filing each petition for writ of habeas corpus is $5.00. Ill. Rev. Stat. 1947, Chap. 53, Sec. 31. *County* of *Will* v. *State*, supra.

Out of the 178 petitions for writs of habeas corpus filed, writs were awarded and hearings were held in 68 cases.

In these 68 cases, at the request of the Attorney General of Illinois, a photostatic copy of the petition was furnished to him by the Clerk of the Circuit Court at a cost of $1.00 per case. Such charge is reasonable and is a reimbursable expense under the specific statute involved in this case. *County* of *Will* v. *State*, supra.

However, in the same 68 cases the Sheriff of Randolph County maintains that he should have been paid $2.00 for serving each writ of habeas corpus, $1.00 for returning each writ, and 40 cents for mileage, or **$3.40** per case, amounting to $231.20 for the 68 cases. However, we can find no statutory provision allowing the sheriff all of the fees he claims. The applicable section of the Fees and Salaries Act, Ill. Rev. Stat. 1947, Chap. 53, Sec. 37, does not mention the allowance of any fees or mileage for serving a writ of habeas corpus. But for returning the writ, the sheriff should be allowed $1.00 in each case.

Although the sheriff might have been entitled to other fees in connection with his duties with writs of habeas corpus, the record in this case is silent thereon, and any award in excess of $68.00 for sheriff's fees must be denied.

In the 68 cases above referred to the State's Attorney has claimed a fee of $20.00 per case based on the following section of the Fees and Salaries Act:

> "State's Attorneys shall be entitled to the following fees: . . . . For each day actually employed in the hearing of a case of habeas

corpus in which the people are interested, $20." (Ill. Rev. Stat. 1947, Chap. 53, Sec. 8.)

The record shows that such 68 cases were heard on eleven different days. On two different days 14 cases were heard: on one day 12; on two days 9; on one day 5; on one day 3; on one day 2, and three days 1.

Although to some the allowance to the State's Attorney of as much as $280.00 for one day's work in connection with habeas corpus cases might appear excessive, the fact remains that the statute above quoted allows him $20.00 per case when a hearing is held and will permit of no proration.

Our conclusion in this regard is supported by the decisions of the courts of Illinois, some of which will be mentioned.

In *Fiedler* v. *Eckfeldt,* 335 Ill. 11, at page 17, it was held that the law does not regard fractions of a day and that "the day is, in general, regarded as an indivisible unit of time, so that any act done in the compass of it is no more referable to any one portion of it than to any other portion." See also *Kuznitsky* v. *Murphy,* 381 Ill. 182.

In *Anthony* v. *Gilbrath,* 396 Ill. 125, at page 128, the court held as follows: "The word 'hearing' is a familiar term and is generally understood as meaning a judicial examination of the issues between the parties, whether of law or fact." *Glennon* v. *Britton,* 155 Ill. 232. See also, *Menard* v. *Bowman Dairy* Co., 276 Ill. App. 323.

The U. S. Court of Appeals for the Seventh Circuit in *Bowles* v. *Baer,* 142 F. 2d 787, stated that the indicia of a hearing were parties, issues of law or fact, action taken which may materially affect the rights of the parties, proceedings usually public, representation by counsel, if not in person, a record of the proceedings, partici-

pation in the proceedings, argument and briefing of the case and entitlement to a copy of the order resulting.

In view of the above authorities the State's Attorney was entitled to $20.00 per case in 68 cases, or a total of $1,360.00.

The County of Randolph is therefore entitled to an award of $2,386.00, and an award is entered in its favor for such sum.

(No. 4168—Claimant awarded $5,200.00.)

PETER N. MOLSEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1950.

J. W. HORWITZ AND A. B. LITOW, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM J. COLOHAN AND WILLIAM H. SUMPTER (JAMES C. MURRAY AND A. ZOLA GROVES, of Counsel), Assistant Attorneys General, for Respondent.

WORKMEN'S COMPENSATION *Act—where an award will be made under.* Where an automotive mechanic employed by the Division of Highways while towing a disabled truck, the driver of the disabled truck applied his brakes with considerable force causing both trucks to stop suddenly and the mechanic was thrown forward, his chest, striking the steering wheel, causing him to fall to the pavement from which he sustained permanent partial disability and was unable to engage in his usual employment, he was entitled to award under Section 8(d) of the Act.

WORKMEN'S COMPENSATION ACT—*liberal interpretation of Act in favor of employees.* The mandate of the Act is that it be construed and administered with a view favorable to employees.

LANSDEN, J.

Claimant, Peter N. Molsen, seeks an award under the Workmen's Compensation Act for disability resulting from an accident that arose out of and in the course of his employment.

On the date of the accident, determined by the proof to be March 5, 1948, Molsen, employed as an automotive mechanic at a Division of Highways garage in Chicago, was sent out with a truck to tow in another State truck which had broken down. While towing the disabled truck, the driver of the truck being towed applied his brakes with considerable force, which caused both trucks to stop suddenly. Molsen was thrown forward, his chest striking the steering wheel, and in some manner the door in the cab of Molsen's truck flew open and Molsen fell out on the pavement. He immediately complained to the other driver of severe pain in his chest, and while sitting on the running board of the truck recovering from the blow to his chest, he spit some blood. The effects of the blow apparently passed off and Molsen towed the truck back to the State garage. Notice of the accident was given upon arrival at the garage to Molsen's superior and later in the day Molsen had to cease working and go home where he rested for three days. He saw his family doctor, Dr. Siegel, who advised him to have an electrocardiogram made.

Upon his return to work, Molsen testified that he suffered severe pains when he tried to do heavy work or heavy lifting, which pains disappeared when he rested. Molsen continued to work regularly until December 15, 1948, but he testified that his duties were more of a supervising nature and that he could not, because of pains in chest, which extended over his shoulders and into his arms, do anything other than minor checking and tuneup of vehicles.

In June, 1948, Molsen requested medical attention because his chest distress had not lessened. From that time until January, 1949, Molsen was periodically treated and examined by respondent's doctors. The final report

on Molsen's condition was macle on February 16, 1949. Molsen filed his complaint in this Court on February 17, 1949.

No jurisdictional questions are raised and all have apparently been complied with.

The evidence that can be considered by the Court is found in the Department Report of the Division of Highways, Department of Public Works and Buildings, and the transcript of the testimony taken before Commissioner Young at two hearings held on May 17 and 26, 1949.

At the hearing on May 26, 1949, Dr. S. I. Weiner, a specialist in traumatic surgery and orthopedics, testified for claimant and Dr. Harry E. Mock testified for respondent. However, in the Departmental Report are contained statements from Doctors H. B. Thomas, N. C. Gilbert, R. M. Potter and Limarzi, in addition to Dr. Mock.

Dr. Thomas of Chicago is cmeritus'professor of orthopedics, University of Illinois, College of Medicine, Dr. Limarzi is an internist under Dr. Thomas. Dr. Gilbert of Chicago is acknowledged to be an outstanding heart specialist. Dr. Mock of Chicago is a specialist in surgery of trauma, especially in connection with chest injuries and is associate professor of surgery, Northwestern University, School of Medicine. Dr. Potter is the roentgenologist who X-rayed Molsen's chest for Dr. Mock's examination.

A careful analysis of the statements of such an array of medical talent leads the Court to the conclusion that claimant is entitled to an award for permanent partial disability. Such conclusion is suggested on either a theory that Molsen's accident aggravated a pre-existing heart

condition or a theory that the force of the blow to his chest was such as to injure his heart directly.

Over three months after the accident, Dr. Thomas found evidence of trauma. **A** muscle squeak over the injured area was observable for over six months. Widened mediastinal shadow was observed by all doctors, the significance of which resulted in divergent views. Medication was prescribed by Drs. Thomas and Gilbert to relieve Molsen of pain, nervousness and apprehension. Dr. Gilbert thought Molsen might have a "contused heart," the symptoms of which appeared at a time consistent with Molsen's complaints that led to his being first sent to Dr. Thomas, who advised light work and avoidance of heavy lifting. Not too much significance was attached to the spitting of blood, Dr. Mock feeling that it was due to an injury to the trachea, but it was felt that such was consistent with an injury in the mediastinal area. Dr. Mock was critical of Dr. Gilbert's ideas as to Molsen's "contused heart" but considered Dr. Gilbert to be a very high-class specialist whom he constantly consulted on heart problems. Dr. Mock definitely stated that Molsen was not a malingerer.

The consensus of the opinions of the doctors was that Molsen showed all indications of angina pectoris, which could have been brought on by the accident or Molsen's own ideas as to his injury or could have been aggravated by the accident. Dr. Mock testified that Molsen could have the fixed idea that he had something wrong with his heart, and this fixed idea would stir up angina pectoris. Dr. Mock conceded that a neurosis was just as bad with angina pectoris as organic disease, and he felt that the numerous examinations and treatments that Molsen had had, with constant suggestions of heart

trouble, could result in Molsen actually being unable to do any heavy work again.

Two other factors should be mentioned. The first hearing on May 17, 1949, had to be discontinued shortly after it commenced because claimant, who was testifying, became upset and, on the advice of Dr. Weiner, who was present, the hearing was set for a later date. Furthermore, Molsen's voice tended to lose its volume as the hearing progressed. This was observed and commented upon by Commissioner Young in his report.

This Court feels that this case presents many factual problems that fundamentally are beyond its competency, but the law places on this Court the duty to decide it, and when all is said and done, the mandate of the Workmen's Compensation Act is that it be construed and administered with a view favorable to employees. The doctors who testified and whose statements have been analyzed did not say that Molsen was not disabled. Their differences were on the point of causation. Even Dr. Mock recommended something be paid on the ground that the injury to claimant played some part in his disability. To the Court, that appears enough under the previous decisions of the Court and of the Supreme Court upon which to base an award. *Harrisburg Coal Co.* v. *Ind. Corn.*, 315 Ill. 377; *United States Fuel* Co. v. *Ind. Corn.*, 313 Ill. 590; *Postal Telegraph* Co. v. *Ind. Corn.*, 345 Ill. 349; *Gross* v. *State*, 11 C.C.R. 310.

Subsequent to his discharge from State employment, Molsen tried to work as a garage mechanic but was unable to continue such work. Then he got a job as a guard at the Cook County jail at $140.00 per month. He found the physical exertion in this work too great and later got a job as an elevator operator at $140.00 per month.

On the date of his injury on March 5, 1948, claim-

ant was 54 years of age, married, but had no children under 16 years of age dependent upon him for support. His earnings in the year prior to his injury amounted to $3,852.00. He earned $250.00 per month from July 1, 1945, to July 1, 1947.

The differential between Molsen's earnings before the accident and his ability to earn thereafter in other employment in work of a lighter nature is not less than $1,560.00 per year.

No compensation has been paid to claimant. He was paid his regular wages until his discharge from employment on December 15, 1948. The payments made to claimant must be treated as wages earned since he did perform services, and such payments cannot be considered as compensation because respondent denied liability throughout. (For a discussion of this problem, see *Olney Seed* Co. v. *Ind. Corn.*, 403 Ill. 587.)

Claimant is entitled to an award under Section 8 (d) of the Workmen's Compensation Act for permanent partial disability. The differential between his earnings before and after the accident makes this a maximum case with claimant's rate of compensation at $19.50 per week, commencing on December 16, 1948, the day after he ceased to earn wages from respondent.

The following creditors have been paid by respondent :

Dr. N. C. Gilbert, Chicago	$ 25.00
Dr. Warren W. Furey (X-ray), Chicago	10.00
Dr. Robert Potter (X-ray), Chicago	8.00
Dr. Harry E. Mock, Chicago	25.00
Dr. H. B. Thomas, Chicago	216.00
Louis Pelzmann (Therapist), Chicago	156.00
Total	$440.00

Rothbart & Sewell, Court Reporters, were employed to take and transcribe the testimony before Commissioner

Young. Charges in the amount of $150.10 were incurred, which charges are fair, customary and reasonable. An award is hereby entered in favor of Rothbart & Sewell in the amount of $150.10.

An award is entered in favor of claimant, Peter N. Molsen, in the amount of $5,200.00, being calculated in accordance with provisions of Section 8 (d) of the Workmen's Compensation Act within the limitations therein prescribed, and being at the rate of $19.50 per week for 266 4/7 weeks, to be paid as follows:

$1,189.50, which has accrued and is payable forthwith;
4,010.50, which is payable in weekly installments of $19.50 per week beginning on the 23rd day of February, 1950, for a period of 205 weeks, plus one final payment of $13.00.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4170—Claimant awarded $1,580.80.

JACK JETT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1950.

HERMAN R. TAVINS, Attorney for Claimant.

IVAN A. ELLIOTT; Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION *Am—where an award will be made tinder.* Where an employee of the State Division of Highways engaged in center line activities and while driving a truck the wheel fell off causing such employee in endeavoring to bring the truck to a stand still, to cut his left ankle and sustained back injuries and his earning capacity was reduced from $50.00 to **$35.00** per week, the claimant was entitled to $20.80 per week for a period of 76 weeks under Par. E of Section 8 of the *Act* for the reason that he sustained permanent loss of **40%** of his left leg.

SCHUMAN, C. J.

On September 27, 1948, Jack Jett, the claimant, was in the employ of the respondent, in the Department of

Public Works and Buildings, Division of Highways, as a temporary truck driver to assist in center line marking activities at a salary of $250.00 a month. At approximately 4:30 P.M. on September 27, 1948, claimant was driving a Division of Highways truck in a northeasterly direction on Archer Avenue in the City of Chicago, returning it to the Division's storage shed. As the truck passed through the 5400 block, the right rear wheel came off, allowing the truck to fall to the pavement and settle on the brake housing. Claimant was operating said truck at a speed from 35 to 40 miles per hour. The jar caused claimant to be thrown from his seat and badly bruised and cut his left ankle. Claimant was knocked about in the cab as the truck veered from side to side and he continued his endeavor to bring it under control and avoid collision with other traffic. When the truck finally stopped claimant was positioned with one knee on the seat while his other foot was on the brake. The lower part of his back had hit the side of the door and the steering wheel. His leg was bleeding. That evening claimant's back was sore and his left leg badly swollen.

No jurisdictional questions are involved and at the time claimant was earning a salary of $250.00 per month. He was first employed on September 17, 1948 and he worked regularly at this same salary rate and in the same capacity from the date of his first employment till the date of his injury on September 27, 1948, and earned a total of $91.67. Employees hired in a capacity similar to that Mr. Jett ordinarily worked less than 200 days a year.

Claimant at the time of the injury had two children, Donald and Jacqueline, aged ten aiid nine, respectively. Respondent paid Dr. H. B. Thomas, Chicago, Illinois, the sum of $112.00, and St. Luke's Hospital, Chicago,

Illinois, the sum of $11.00 for medical expenses in connection with claimant's injury. No further claim is made on account of medical expenses and the only question relates to the nature and extent of claimant's injuries with respect to his claim for complete and permanent disability.

Claimant stated he had suffered no injury to his back nor had he ever experienced his present back pain prior to the accident in question. Prior to his employment by respondent, claimant had been unemployed. His occupation has been that of chauffeur and he has driven trucks, cars or taxicabs for about **22** or **23** years. During the year preceding the accident he had his own business whereby he was driving a truck into farm areas near Chicago to purchase chickens. He stated that, although *to* his knowledge truck drivers generally received $250.00 per month wages, during the year preceding the accident his earnings had been less due to misfortune in his business. Claimant has not earned any money since the accident. He explained he obtained a job as a mechanic, for which he is qualified, but had to give it up because the nature of the work, bending and twisting, increased the pain in his back. He stated his back hurt when lifting objects. He said he tried digging in his garden and was required to stop on account of pain caused in his back when he put pressure on his foot. Claimant believed he could perform the work of a chauffeur or truck driver as long as he didn't have to do lifting. However, despite efforts through employment agencies he has been unable to get re-employed as a chauffeur or truck driver since the accident. After his back pain did not clear up, he first consulted an attorney in Januaiy, 1949; later in April he was given a medical examination by Dr. Samuel I. Weiner. Claimant stated he has had no trouble with his ankle.

Dr. Samuel I. Weiner, physician and surgeon, a member of the staffs of Mt. Sinai and Michael Reese hospitals in Chicago, testified on behalf of claimant. Dr. Weiner since about 1927 has speciaiized in the fields of industrial medicine and surgery and orthopedics.

Dr. Weiner made a clinical examination of claimant on April 20, 1949, and took anterior posterior and lateral X-rays of his lumbar spine and pelvis. He testified the X-rays disclosed an irregularity and malformation in claimant's lumbrosacral articulation which he believed of congenital origin. There was articular roughening and calcification where the lumbar spine articulates with the ,sacrum. It was further stated there was extensive spurring of the anterior portion of the body of the fifth lumbar vertebra and a small spur on the anterior interior portion of the body of the fourth lumbar vertebra. It mas noted there existed a narrowing of the intervertebral space between the fourth lumbar body and the fifth, and considerable narrowing between the fifth lumbar body and the sacrum posteriorly, also that the lumbrosacral angle was more than normally acute. Dr. Weiner's diagnosis was that of an aggravation of a pre-existing arthritis of the lumbar spine and of a congenital defective articulation of the lumbrosacral region which could have been aggravated by the accident in question and that there could or might be a causal connection between claimant's ill being and said accident. In the doctor's opinion claimant, because of his spinal condition, was unfit for a regular eight hour day's work of driving an automobile.

Dr. Weiner explained that persons having a congenital malformation of the fifth lumbar are particularly susceptible to injury in the region of the lower back be-.cause the articulation is not stable and solid providing

the necessary support. He said any form of injury such as a jarring or direct trauma upsets the weakened state and causes the symptoms as in the present case. Dr. Weiner admitted claimant's injury could have been caused by any undue strain on his back as by digging, stumbling while carrying a heavy object, lifting off balance, etc. He stated such a condition is quiescent as long as no strain is put on it, and, upon strain it would recur, Claimant's condition was considered by the doctor to be permanent but that claimant could do any work that did not put a strain on his back. Dr. Weiner stated that cases, as the instant one, where a congenital deformity is found the symptoms are persistent and do not respond to the usual type of treatment.

The Departmental Report sets forth the findings of Dr. H. B. Thomas, who treated claimant for his injuries. Dr. Thomas also found the claimant to have a moderate arthritic condition in his lower lumbar spine and sacroiliac joints, however, that X-ray views showed no injury to the bone. Dr. Thomas treated claimant for the pain he suffered in his lower back, and on November 11th suggested he go to a hospital. Dr. Thomas stated that at the time of his last examination of claimant on December 6, 1948, he could find no spasm in his back, accordingly dismissed him without disability. In his final report, dated December 9,1948, Dr. Thomas wrote :

". . . Lumbar spine: catches in back when he tries to turn. Bending limited in all directions (bends little unless he bends knees). Reflexes O.K. Back straight but flat. Treatment—Sent to St. Luke's for physiotherapy. Said he did not receive satisfactory results. Injections of novocain and medication. Discontinued any further treatments from St. Luke's. Prognosis—Good. No disability."

A fair and just conclusion to be drawn from the evidence in this case shows that the claimant was earning approximately $50.00 a week at the time of his injury

and according to his testimony, which stands uncontradicted, that the only work that he can perform and could earn any money in would be that of a watchman at which he would earn the sum of $35.00 a week. The difference between his earnings before this accident and after the accident would amount to $15.00 per week. The Court concludes from the testimony that the claimant is entitled to have and receive from respondent the sum of $20.80 per week for a period of 76 weeks, as provided in paragraph E of Section 8 of said Act, as amended, for the reason that the injuries sustained caused the permanent loss of the use of 40% of the claimant's left leg. The evidence shows that the claimant was paid temporary compensation through December 6, 1948. Therefore, compensation payments in this case should start as of December 7, 1948.

Rothbart & Sewell filed a claim for stenographic services in the amount of $67.40, The Court finds that this claim is reasonable.

William J. Cleary & Co. filed a claim for stenographic services in the amount of $21.10. The Court finds that this claim is reasonable.

On the basis of this record, we make the following award :

Forty per cent permanent partial specific loss of the use of the left leg in the sum of $1,580.80, payable in weekly installments of $20.80 commencing on December 7, 1948. Sixty-one weeks of said compensation has accrued to February 7, 1950 in the amount of $1,268.80 **and** is payable forthwith, the balance of **$312.00** is payable at the rate of $20.80 per week for 15 weeks.

An award is also entered in favor of Rothbart & Sewell for stenographic services in the amount of $67.40, which is payable forthwith, and. the Court finds that said charge is reasonable, and said claim is allowed.

An award is also entered in favor of William J.

Cleary & Co. for stenographic services in the amount of $21.10, which is payable forthwith, and the Court finds that said charge is reasonable, and said claim is allowed.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4181—Claimant awarded $3,290.63.)

GEORGE VICKERY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1950.

DIXON, DEVINE, BRACKEN AND RYAN, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where award will be made under* Where a Carpenter employed at the Dison State Hospital fell 14 feet, while working, to a cement floor, and sustained a fracture of the left humerus at the elbow joint causing 75% permanent partial specific loss of the use of the left arm, he received an award therefor under the Act.

SCHUMAN, C. J.

The claimant, George Vickery, was on January 29, 1948 employed by the respondent as a carpenter, and on the above date, while working at the Dixon State Hospital, Lee County, Illinois, claimant fell a distance of fourteen feet to a cement floor and as a result thereof sustained a fracture of the left humerus at the elbow joint.

At the time of the above injury, the claimant was 58 years old, married, with no minor children.

During the time from January 29, 1948 to May 30, 1948 the claimant was paid by the respondent 17 weeks and 2 days pay as compensation at the rate of $19.50.

Claimant returned to his employment by the respondent on May 30,1948 and continued to work until January 20, 1949. On January 21, 1949, an osteotomy was performed at the head of the radius on the claimant's left arm, removing part of the bone. This operation became necessary as a result of the injury sustained by the claimant on January 29, 1948.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident arose out of and in the course of employment.

The only question to be determined is the extent of the permanent partial loss of the use of the left arm together with the medical services rendered to the claimant.

Dr. David Murphy testified that he attended claimant on January 30, 1948 at the request of Dr. Tarnowski, and that the X-rays showed fracture displaced on the radial side of the left humerus of the left arm. The radial condial was displaced posterially and they were divided. That it was a bad type fracture and T type of humoral condyles was applied to the forearm; that on January 21, 1949 osteotomy operation was done on the head of the radius. That claimant convalesced and had improvement in the extension of his arm to the extent of 135°, normal extension being 180°. That the ulner nerve became involved which interfered with the extension of his fingers and that his grip is fair. That considering his occupation as a carpenter, the extension of his arm is very weak. That the elbow had slightly improved and that the disability relative to his arm is fully 85% to 100% of the use of his arm. That in the doctor's opinion, claimant has sustained a permanent injury to his arm which interfers with the extension and flexion. That his bill for

services was in the amount of $280.00, which was a fair and reasonable charge for his services:

Dr. Alexander Tarnowski mas called by the respondent and testified that he examined the claimant on August 9,1949 at the request of the Attorney General. That he found that the claimant had practically no use of his left hand. That he had a slight movement in the fingers,, and there wasn't complete loss of motion. That claimant had fairly good motion of the wrists. That the motion which controls the movement of the forearm called pronation and supination was fairly good.. That the motion of the elbow joint which causes extension and flexion of that member was impaired by about 60%. That claim-.ant had fairly good use of the shonlder and that there was some loss of ability to raise his shoulder. That in his opinion the claimant had loss of function in the left upper extremity of about 75% and that in his opinion the condition that he found was permanent.

The Court finds that Helen Heckman has submitted a bill for stenographic services in the amount of $15.00, which the Court finds to be a customary and reasonable charge.

The claimant was treated by Dr. D. L. Murphy, who has submitted for his services rendered to claimant a bill in the amount of $280.00. The Court finds this bill to be reasonable and customary.

The record shows that the earnings of the claimant for the year immediately preceding his injury mas in the sum of $3,000.00.

The evidence, and particularly the medical witnesses, clearly establishes that the claimant has sustained a permanent partial specific loss of use of his left arm to the extent of 75%.

On the basis of this record, we make the following award:

For the 75% permanent partial specific loss of use of the left arm, claimant is entitled to an award of 168¾ weeks in the amount of $3,290.63, payable in weekly installments of $19.50 each, commencing on March 31, 1949. 47 weeks of which has accrued to February 16, 1950 in the amount of $916.50, which is payable forthwith and the balance of $2,374.13 payable in 121 weekly installments of $19.50 each. with a final installment of $14.63.

An award is also entered in favor of Helen Heckman for stenographic services in the amount of $15.00, which is payable forthwith.

An award is entered in favor of Dr. David Murphy for medical services rendered in the amount of $280.00, which is payable forthwith.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4188—Claimant awarded $462.29.)

EARL SPENCER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1950.

HAROLD T. BERC, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION *Am—where an award will be made under.* Where an employee at the Elgin State Hospital engaged in the duty of taking patients by truck to and from the farm operated by the institution, and the truck hit a hole in the dirt road resulting in claimant being thrown into the air and falling, injuring his back on the floor of the wagon, from which injury it was found the claimant sustained a permanent partial specific loss of 10% of the use of both legs for which he received an award under the Act.

SCHUMAN, C. J.

Claimant, Earl Spencer, was employed by the State of Illinois at the Elgin State Hospital, Elgin, Illinois, and

on November 22, 1948 claimant sustained an injury while in the course of his employment. No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act and the accident arose out of and in the course of his employment. Respondent furnished complete surgical, medical and hospital treatment except for the expenditure of $13.70 for a body brace.

That the earnings of the claimant during the year preceding the injury were $2,100. Claimant received his full salary of $175.00 per month for full time from the date of the accident to the present time. No claim is made on the grounds of temporary total disability. At the time of the accident claimant had no children under the age of 16 years and the sole question for adjudication is the nature and extent of his injury.

Claimant, Earl Spencer, 64 years of age, was employed by respondent on November 22, 1948, as **a** farm hand at the Elgin State Hospital in the Department of Public Welfare. It was the duty of the claimant to take a group of patients to the farm, operated as a part of the institution, and direct and supervise their work. Engaged in this capacity claimant would ride in a wagon towed by a tractor back and forth from the farm area, about a mile distant from the hospital. The wagon was not equipped with seats. At the close of the above day, while sitting on the floor of the wagon as it was returning from the farm over a dirt road located on the grounds of the hospital, the wagon struck a hole. The claimant was thrown in the air and fell injuring his back on the floor of the wagon. He was helped out of the wagon by the tractor driver and his assistant and laid on the grass beside the road. The farm boss, Hubert Draper, came with an automobile and took claimant to his room. The

next morning he was taken in an ambulance to the Elgin State Hospital where he was X-rayed and examined by Dr. Hudell, a staff physician and surgeon. On December 4th claimant was put in a body cast and on December 6th he was taken home. Claimant wore the cast for **12** weeks, returning to his employment on February 28th.

The facts show that the claimant is now wearing a corset or brace on his back which prevents him from tiring, provides support, lessening his pain; that claimant at the time of the hearing was suffering from a backache, but that he still performs the same work for the respondent. Claimant further testified that he experienced pain when he stoops or bends and is prevented from lifting heavy objects and that he was required to sleep with a board under his mattress, and that his condition has not improved much during the last two or three months.

Dr. Albert **C.** Field testified for 'claimant as an expert witness and described his objective findings as limitation of motion in claimant's back, as well as tenderness, muscle rigidity and muscle spasms in the lumbar region above the lumbar lordosis and tenderness of both sciatic nerves in both thighs. Dr. Field interpreted an X-ray film which he took of claimant's back and stated:

"——which shows a compression fracture of the first lumbar and vertebral narrowing of the anterior region with some evidence of bony injuries to both the superior and inferior articulating sarfaces of the vertebrae. In other words, shows **he** had a chip fracture in addition to his compression fracture of both of the articulating surfaces of the superior and inferior region, which is a comminuted fracture of the first lumbar vertebrae."

Dr. Field described claimant's condition as having a fairly well healed compression fracture of the first

lumbar vertebrae. He said claimant would have considerable permanent disability because the anterior surface of the vertebrae is narrowed, putting the weight bearing surface out of line and placing it under a stress and strain of the ligaments and tendons, especially the intercostal nerves in the lumbar region as well as the ilio-hypogastric nerve and the ilio-inguinal nerve. It was the opinion of Dr. Field that claimant suffered a traumatic arthritis due to the accident and resulting from roughness of the articulation of the vertebrae due to the chip or evulsion of the first lumbar vertebrae. He predicted considerable weakness in claimant's back because of the altering of the attachment of muscles. It was the opinion of Dr. Field that the injury to the lumbar region of claimant's back affected his lower extremities to the degree of about 30% loss of use of each leg. He stated, however, that claimant would not be limited in the course of his present supervisory work unless he attempted to do any lifting.

Dr. John C. Hudell, physician and surgeon, treated claimant for his injuries. Dr. Hudell, witness for the respondent, is on the medical staff of the Elgin State Hospital and is engaged in the general practice of medicine including central administration of medicine and the performance of whatever surgical procedure may be necessary to treat illnesses of patients at the hospital. He first began treating claimant on November **24,** 1948. He stated X-rays at the time disclosed him to have suffered a mild compression fracture of the body of the first lumbar vertebrae with no dislocation of the articular surfaces or rotation of the vertebrae. There was an evulsion of a chip or small segment of the anterior and superior lip of the first lumbar vertebrae. Neurological examination was negative. Claimant's fracture was reduced by hypraextension of the back and he was placed in a cast on De-

cember 4th. Dr. Hudell said claimant was comfortable and walked well in his cast. Mr. Spencer was then discharged to out-patient care. Thereafter further X-rays were taken at one month intervals. Dr. Hudell stated claimant wore the body cast for twelve weeks when he was discharged from the care of the hospital and placed in physio-therapy treatment and diathermy exercises.

Dr. Hudell said it would be difficult to estimate how long claimant would be required a wear the brace he now uses. Dr. Hudell qualified his statement that subsequent X-rays failed to reveal any abnormality by adding that he could not say there was no evidence of strain or tenderness. With the passage of time Dr. Hudell stated there would only be a minimal disability of claimant—a small amount of pain in the performance of his duties but not enough to physically disable a man from his chosen avocation. Dr. Hudell stated claimant might be handicapped in lifting heavy objects. Dr. Hudell testified that while claimant has a light limitation of flexion of his leg from a prone position that he can rotate his trunk freely; that hypra-extension is within normal limits and that his spine is straight with no evidence of kyphoses, bending of the spine backwards, or lordosis, bending of the spine forwards, or of bending the spine to the side.

The Court finds that William J. Cleary & Co. has rendered stenographic services in the,amount of $129.70, which charge is fair and reasonable.

The Court concludes from the evidence that while there is no specific evidence with reference to any specific loss in this case from the medical testimony and the examination by the Commissioner, that the claimant has suffered some degree of permanent disability affecting his limbs. The Court concludes from the evidence that

the claimant has sustained a permanent partial specific loss to the extent of **10%** of use of both legs.

The evidence shows that the claimant expended the sum of $13.70 for a back brace. That all the other hospital and medical expenses were paid by the respondent.

The record shows claimant was paid full time during period of temporary total disability in the amount of **$565.41** for a period of **14** weeks. His compensation during said period would have been **$273.00.** He was therefore overpaid in the amount of **$292.41,** which will have to be deducted from the award.

On the basis of this record we make the following award:

Ten per cent permanent partial specific loss **of use of both legs, the sum of $741.00, less the sum of $292.41, or in *the* amount of $448.59, all of which is accrued and is payable forthwith.**

An award of $13.70 for **brace purchased by claimant.**

An award is also entered in favor of William **J.** Cleary & Co. for stenographic services in the amount of **$129.70,** which is payable forthwith and the Court finds that said charge is reasonable and said claim is allowed.

This award is subject to the approval of the Covernor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4190—Claimant awarded $1,160.25.)

LELAH E. LOHR, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1950.

ROY **A. PTACIN,** Attorney for Claimant.

IVAN **A. ELLIOTT,** Attorney General; **WILLIAM J. COLOHAN AND WILLIAM** H. **SUMPTER,** Assistant Attorneys General, for Respondent.

WORKMEN'S COMPENSATION *Am—where an award will be made under.* **Where a female accountant and bookkeeper, employed at the**

State Hospital, fell on an icy walk of the institution and broke her left wrist, and it was found that she suffered 35% loss of her left hand, she was entitled to an award under the Act.

LANSDEN, J.

Claimant, Lelah E. Lohr, was employed on February 3, 1949, as an accountant and bookkeeper by respondent at the Chicago State Hospital in the Department of Public Welfare. On that day while walking between the employee's building and the administration building on the grounds of the above institution she slipped on an icy walk, fell, and broke her left wrist. Claimant, 58 years of age, was immediately taken to the institution's hospital for employees. Her arm was X-rayed on the same day and placed in a cast. Miss Lohr wore the cast for four weeks and a splint for two weeks thereafter.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act and the accident in question arose out of and in the course of the employment. Respondent received timely notice of the claimant's injury. The instant claim was filed within the period provided by statute. No claim is made for surgical, medical or hospital treatment, respondent having furnished same. The only question is the nature and extent of claimant's injury.

Claimant testified she had never had any trouble with her left hand or arm prior to the instant accident. Her hand hurt with different movements. Pressure caused pain. Her fingers were stiff, and to carry books she had to hold them against her body. Her hand was slightly swayed.

Claimant demonstrated before Commissioner Young the impaired limitation of action, movement and strength of her left hand from normal and in comparison with her right hand. She stated she has exercised and endeav-

ored to use her left hand to improve its condition. However, little change has resulted during the last three or four months. She described that she felt pain in her left wrist and hand whenever pressure was applied as when washing clothes.

Dr. Albert C. Field, physician and surgeon of Chicago, Illinois, testified on behalf of the claimant as to his medical examination of her conducted on April 15, 1949. Dr. Field stated:

"Both her upper extremities were examined, the right for comparison. All comparitive measurements. The right forearm measures 8¾ and the left 7¾. With some atrophy present in the left forearm. The left wrist measures 5½ and the right 5¾. Over the lower end of the radius, and ulna, the left measures 6¼ and the right 5¾. The movements in the wrist joint are restricted. Flexion was limited about 40 degrees, bending down, and extension 35. Pronation is within normal limits and supination about half of its normal range. There was some shortening of the radius with a prominence at the lower end of the ulna. The hand is deviated toward the radial side. There is considerable stiffness of the fingers. The ring finger is held in a flexed deformity, a limitation of extension about 30 degrees and the little finger a limitation of extension about 30 degrees. Actively, she lacks about a half inch of bringing the tip of the fingers to the palm of the hand, to the metacarpo flange. She was unable to make a firm fist or hold a small object. I took some X-rays of her wrist, forearm and hand."

He interpreted the X-rays taken by him to show that a comminuted fracture at the lower end of the radius had been suffered by claimant, the comminutions extending in the joint space. He explained that the significance of the comminuted fracture extending into the joint space as causing a rotten articulating surface and as tending to cause traumatic arthritis and pain. He explained the shortening of the radius causes a deformity of the arm. Dr. Field stated his opinion was that the present disability of claimant's hand was permanent.

Dr. Louis Olsman, physician and surgeon on the staff of the Chicago State Hospital, treated Miss Lohr for her

injury. He testified on behalf of the respondent. After describing the treatment which he gave claimant for her injury and providing an interpretation of the X-ray films taken in connection with her case, he stated that claimant had already obtained the maximum improvement she could expert in the restoration of use of her hand.

The only essential differences in the testimony related to the percentage loss of use of claimant's left hand. One of the doctors attached significance to osteoporosis in the left hand shown by X-rays, but conceded that it usually appears after immobilization of a member and tends to disappear with movement of the member unless age and factors other than immobilization contribute primarily to the condition.

Claimant was hospitalized until February 7, 1949, when she was discharged and she returned to her duties. During this period she received her full salary. Dr. Olsman commented that her type of work was such that could be carried on with her left arm partially immobilized. Claimant has been in the employ of respondent since 1917. During the year prior to the accident her earnings were $2,940.00. Claimant is unmarried and has no children under the age of 16 years dependent upon her for support.

From the evidence we conclude that claimant has suffered a 35 per cent loss of use of her left hand and is entitled to an award.

William J. Cleary & Co., Court Reporters, Chicago, Illinois, were employed to take and transcribe the testimony before Commissioner Young. Charges in the amount of $63.00 were incurred, which charges are reasonable and customary, and an award is, therefore, entered in favor of William J. Cleary & Co. for such amount.

An award is entered in favor of claimant, Lelah E.

Lohr, in the amount of $1,160.25, being at the rate of $19.50 per week for 59½ weeks, payable as follows:

$1,053.00 which has accrued and is payable forthwith;
107.25 payable in weekly installments of $19.50 per week for 5 weeks commencing on February 27, 1950, plus one final payment of $9.75.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4194—Claimant awarded $364.74.)

PAUL O. DAVID, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1950.

FRED BRANSON, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award will be made under.* Where an employee at the Illinois Security Hospital was kicked by a patient in his right knee and as a result received a fracture about one (1) inch below the knee and it was found that he sustained a permanent partial specific loss to the right leg of 20%, he was awarded therefor under the Act.

SCHUMAN, C. J.

Claimant, Paul O. David; was employed by the State of Illinois, Department of Public Welfare, at the Illinois Security Hospital, Menard, Illinois, and while performing the duties of his employment on October 7, 1948, he was kicked by a patient in his right knee and as a result thereof received a fracture of the bone about one inch below the knee.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act and the accident arose out of and in the course of his employment. According to the record, respondent

furnished complete surgical, medical and hospital treatment, except for the expenditure of **$3.50** for a cane, crutches and a knee pad.

The earnings of the claimant during the year preceding the injury were $2,640.00. Claimant received his full salary subsequent to the injury and up to the date of his discharge on April 8, 1949. There is no claim made in the record for any hospital, medical or surgical attention. At the time of the accident, claimant had no children under the age of 16 years, and the sole question for adjudication is the nature and estent of his injury.

Dr. Erich 'Otten testified that he was on the staff at the Anna State Hospital, at Anna, Illinois, and that he saw the claimant on October 7, 1948. That the X-rays which were taken on October 8th showed an incomplete linear fracture through the medial plateau of the right tibia with no displacement. And that he also took a picture of an old injury and the diagnosis on the old fracture was as follows: "old fracture of both bones involving the lower one-third of the tibia and fibula", and that was an old injury. That in his opinion there was some permanent injury that would prevent the claimant from doing heavy physical work. He fixed the disability as some limitation of motion which would improve slowly. He stated that the flexion or extension of the leg was not limited, but was only affected in his walking, and that in his opinion the limitation was confined to his bearing of weight on his leg.

Additional testimony was offered, and Dr. E. E. Holloway testified that he saw the claimant on November 25,1949 and made an examination of his right knee. There apparently were no X-ray pictures taken by Dr. Holloway, nor did he have the advantage of any X-rays that had been previously taken of this man's right knee. Dr.

Holloway testified that he noticed in examining the knee joint there was a crepitation in the right knee joint which he diagnosed as a fragment or chip of cartilage in the lower portion of the patella. He found a ligamenta1 condition in the left side of the knee just above the patella where the leg is attached to the patella. In measuring seven inches above the knee joint he found the right leg to be two inches less in circumference than the left leg. That the claimant did not have complete extension of the right leg. That the claimant has a permanent partial disability, and that it would prevant him from doing certain types of work, and that any work that would put a strain or weight on that knee would cause disability because the knee wasn't stout enough. The claimant couldn't stand heavy pressure on the right knee like he could on the other one. That in his opinion, while it would be kind of guesswork, that he would judge that he had about a 33 1/3% loss or disability of the right leg. He described it as being kind of like a rheumatism, bad at times and other times not so bad. That the trouble with the claimant's right knee was in the extension, and that in his opinion the condition he found would be permanent.

The record shows that the Commissioner examined the claimant's right leg on both hearings.

The Court concludes, while the evidence is not entirely satisfactory, that there is some specific loss of the claimant's right leg which is shown by the medical testimony in the examination by the Commissioner. The Court concludes from the evidence that the claimant has sustained a permanent partial specific loss to the right leg to the extent of 20%.

The Court finds that Rosalee Cox has rendered steno-

graphic services in the amount of $12.00, which charge is found to be fair and reasonable.

The Court further finds that the claimant expended the sum of $5.00 for crutches, $2.50 for a knee pad, and $1.00 for a cane, for a total of $8.50, for which the claimant should be reimbursed.

The Court further finds from the evidence that the claimant necessarily expended money in going to and from his home in Anna, Illinois, where he was compelled to go for his examination, medical treatment and hospitalization and find from the evidence that he should be awarded $75.00 for these expenses.

The record shows that claimant was paid full time during the period of his temporary total disability in the amount of $752.26. His compensation during said period would have been $292.50 for 15 weeks temporary total disability. He was therefore overpaid in the amount of $459.76, which will have to be deducted from the award.

On the basis of this record, we make the following award:

Twenty per cent partial specific loss of use of the right leg in the sum of **$741.00** from which award will be deducted the sum of **$459.76,** overpayment for non-productive time, leaving a balance due of $281.24, all of which has accrued and is payable forthwith.

An award of $83.50 for expenses necessarily incurred by the claimant in the treatment of his said injuries.

An award is also entered in favor of Rosalee Cox for stenographic services in the amount of $12.00, which is payable forthwith, and the Court finds that said charge is reasonable, and said claim is allowed.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4211—Claim denied.)

ROOSEVELT ROBERTSON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed ***February 14, 1950.***

DAVID R. SILVERZWEIG, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

LATCHES—*Where motion to dismiss will be allowed on account* of. Where a prisoner in the Illinois State Penitentiary assigned to demolishing a cell house which collapsed and his right leg was so badly injured so as to require amputation, which injury occurred on November 5, 1943, and prisoner was discharged on July 12, 1947, and filed his claim on July 12, 1949, it was held to be filed too late, the date of the accident tolled the operation of Section 22 of the Act as the prisoner's right to sue was limited to two (2) years after that date. *(Citing McElyea* v. *State, 7* **C.C.R. 69.)**

LANSDEN, J.

Claimant, Roosevelt Robertson, on July 12, 1949, filed a complaint seeking to recover damages from respondent for negligence.

The complaint alleged that claimant, on August 5, 1942, entered the Illinois State Penitentiary at Joliet, Illinois, after his conviction in Cook County, Illinois, and on November 15, 1943, while still a convict, claimant with other inmates was assigned to work demolishing a cell house in the institution. During such work, part of the structure collapsed and as a result claimant's left leg was so badly crushed that amputation was required.

As a basis for his action for negligence claimant alleged that respondent failed properly to supervise the work, failed to take proper and reasonable precautions to prevent claimant's injury, assigned untrained men to the dangerous work of demolition of the cell house and violated the provisions of the Illinois statutes relating to "Structural Work," now found at Ill. Rev. Stat. 1949, Chap. 48, Sees. 60-69.

Claimant further alleged that he was discharged from imprisonment on July 12,1947.

Respondent has filed a motion to dismiss on the ground that the case is filed too late. Respondent's supporting brief, attached to which is a report, including a parole agreement, from the Division of Correction, which shows that claimant was released from Joliet on parole on May 18, 1944, sets forth respondent's contentions. Respondent contends that this Court has no jurisdiction of this case since it was not brought within two years of claimant's release on parole, although it is conceded that claimant's certificate of final discharge was not delivered to him until July 12, 1947.

Claimant contends-that he had two years from the date his final discharge was delivered to him in which to file his claim because he could not sue while imprisoned, which imprisonment in legal contemplation continued until receipt of his final discharge.

The contention of neither claimant nor respondent is determinative of this case as will hereinafter appear.

Section 22 of the present Court of Claims Act, Ill. Rev. Stat. 1949, Chap. 37, Sec. 439.22, provides that the filing of a claim, unless sooner barred, within two years of its accrual is jurisdictional "saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues two years from the time the disability ceases."

Section 10 of the prior Court of Claims Act, Ill. Rev. Stat. 1943, Chap. 37, Sec. 436, provides a five-year period of limitations, unless sooner barred, saving to the same categories of persons mentioned in the present Section 22 the same two-year period after removal of the disability.

The phrase "unless sooner barred" which appears

in both former Section 10 and present Section 22 above referred to, does not apply to this type of case.

Although the claim arose prior to the present Court of Claims Act, which took effect on July 1, 1945, and claimant's right to recover is governed by the former Court of Claims Act, *Newman* v. *State*, 17 C.C.R. 187, this Court held in *Brown* v. *State*, 17 C.C.R. 79, that the present Section 22 governs the jurisdictional requirement of the time in which a claim must be filed because the present law contained no saving clause as to claims that accrued prior to the present law.

It is manifest that this Court has no jurisdiction of claimant's claim under the prior act as limited by present Section 22, unless the saving clause in said section operates to protect him as within the category of "persons under other disability at the time this claim accrues." Claimant was not so protected.

The precise question was answered by this Court in *McElyea* v. *State*, 7 C.C.R. 69. In that case claimant, while an inmate at the then Southern Illinois Penitentiary at Menard, was, in 1922, injured. He waited over seven years to file his claim, which was filed shortly after he was released on parole. Said Section 10 of this former Court of Claims Act was then in force and, except for the five-year period in which to file, was the same as present Section 22, which reduced the time to two years.

The Court in the *McElyea* case said:

"The law of this State gives unto a prisoner serving a sentence in any penal institution the right to sue or be sued in the Courts of this State during the period of such confinement. A convict does not lose his personal rights because of his imprisonment although he is deprived by law of certain rights of citizenship. Therefore, as he possessed said personal rights the claimant was entitled, able and free to exercise them, even though he was confined in the penitentiary."

The Court in the *McElyea* case then dismissed the case.

That a convict in a penitentiary may sue was assumed by Judge Lindley in an action brought in the United States District Court for the Eastern District of Illinois. In *Gordon* v. *Garrson,* **77** F. Supp. **477,** plaintiff's right of action under the Civil Rights Act; 8 U.S.C., Sees. **43-48,** arose while he was an inmate at the Illinois State Farm at Vandalia, and at the time he filed his complaint in the Federal Court he was confined in the Illinois State Penitentiary at Joliet.

In view of the foregoing, claimant has filed his complaint too late.

The motion of respondent to dismiss is sustained and the case is dismissed.

(No. 4101—Claim denied.)

CORA SCHWEMER AND WILLIAM C. SCHWEMER, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 7, 1950.

RODNEY A. WRIGHT, Attorney for Claimants.

IVAN **A.** ELLIOTT, Attorney General, for Respondent.

BAILMENTS—*where State cannot be liable* for *negligence* of *bailee.* Where a former inmate of the Elgin State Hospital and her husband sought to recover the value of a ring set with nine (9) diamonds claimed to have been left with the office personnel and was not found subsequent to her parole, it was held that an insane person lacked the capacity to enter into a bailment based on contract and there being no bailment contract there can be no recovery on the theory of the Bailee's negligence. The husband's claim was denied as being without substance and in any event filed too late.

LANSDEN, **J.**

Claimant, Cora Schwemer, seeks to recover of respondent the value of her platinum ring set with nine diamonds, which ring was left with the office personnel of the Elgin State Hospital, Elgin, Illinois, at the time she entered said hospital as a patient on May 10, **1945,**

and which was not found at the time of and subsequent to her parole on May 22, 1946, from said institution.

On May 22, 1947, claimant, Cora Schwemer, was discharged, presumably as a cured and sane person with her civil rights restored. Her disability having been removed, she, therefore, was in a position to file her complaint in this Court within two years of her discharge, which was the date her disability ceased. Sec. 22, Court of Claims Act, Ill. Rev. Stat. 1947, Chap. 37, Sec. 439.22. This she did in apt time, her complaint having been filed on June 30, 1948.

As to claimant, William C. Schwemer, the husband of the other claimant, the Court is unable to understand his presence in this case. The ring was given by him to his wife as a present in 1935. He asserted no property right in the ring. ,Furthermore he, not being under any disability, learned of the disappearance of the ring within two weeks after his wife was released on parole on May 22, 1946. His claim, if he ever had one, having been filed on June 30, 1948, was filed too late and this Court has no jurisdiction of the case of claimant, William C. Schwemer. Ill. Rev. Stat. 1947, Chap. 37, Sec. 439.22.

Liability of respondent in this case is predicated on the negligence of a bailee, even though gratuitous. A bailment is based on contract. Claimant, Cora Schwemer, on May 10, 1945, as an insane person lacked capacity to enter such contract or to authorize any one to do so in her behalf. There being no bailment contract, there can be no recovery in this case on the theory of the bailee's negligence.

But is there any other theory upon which claimant, Cora Schwemer, can recover? We think not.

Section 8 of the Court of Claims Act, Ill. Rev. Stat. 1947, Chap. 37, Sec. 439.8, confers jurisdiction upon this

Court when the claim is based upon a law of the State of Illinois or upon any regulation thereunder by any executive or administrative officer or agency. No statute or regulation is pleaded, and none has been brought to the Court's attention which will support this claim.

Said Section 8 further provides that this Court has jurisdiction of any claim based upon any contract entered into with the State of Illinois. Having eliminated the bailment contract, can it be said that when the ring was taken, if it was, from claimant, Cora Schwemer, respondent impliedly promised to keep it safely?

This Court has previously held that respondent cannot be held liable for breach of an implied contract. *Dutton* v. *State*, 16 C.C.R. 64. In that case services were performed without authority in the appropriation involved. Although the services performed in the *Dutton* case benefitted respondent, claimant was denied recovery.

We, therefore, are constrained to and do hold that claimant, Cora Schwemer, has alleged no statute, regulation or contract which would warrant either the assumption of jurisdiction by this Court or the making of an award.

The claims of both claimants, Cora Schwemer and William C. Schwemer, are denied.

Awards denied.

(No. 4162—Claim denied.)

CHARLES H. JETTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

***Opinion** filed March 7, 1950.*

R. W. HARRIS, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S **OCCUPATIONAL DISEASES** ACT—*where award will be denied.* **Where an employee claimed to have contracted** tuberculosis

while acting as a guard at the Illinois Security Hospital ana the evidence showed that he had a lung condition previous to his employment at that institution and no subsequent aggravation of that condition — his claim was denied.

DELANEY, J.

This claimant seeks an award for contracting active tuberculosis under the Workmen's Occupational Diseases Act.

The record consists of the complaint, departmental report, transcript of testimony, abstract of evidence, claimant's X-rays and claimant's waiver of brief.

Claimant was employed by the Department of Public Welfare of the State of Illinois in the capacity of a guard at the Illinois Security Hospital at Menard, Illinois, for the period from February 16, 1944, to July 25, 1948, when his services were terminated.

The record shows that, at the time of his employment he was examined by the institution physician, which he satisfactorily passed, and that he was X-rayed at a later date. Claimant testified that he worked in the tuberculosis ward at the Security Hospital from December, 1945, to May, 1947. Dr. Alonzo N. Baker, who testified as an examining physician, stated that he took X-rays and that such picture showed two spots on the upper lobe of claimant's left lung which was questionably active but that a sputum examination was not made. The doctor further stated that he could not establish absolutely from the X-ray whether or not the condition was active. The respondent's Exhibit A, which includes a departmental report made by Dr. Morris Greenberg, Tuberculosis Central Physician, Department of Public Welfare, shows several sputum tests made of claimant and all of these tests were negative as to tubercle bacilli. The respondent's report by Dr. Morris Greenberg fur-

ther showed that claimant was examined April 20, **1944,** which examination showed from the X-ray film taken at that time that a density in the left lung of the claimant existed at a time prior to his employment by the respondent.

The evidence fails to show that claimant contracted an occupational disease while employed by respondent. The claimant, having failed to establish by the evidence that he is entitled to an award, his complaint must be dismissed.

Award denied.

Gray Brewer, Court Reporter, has filed a bill for reporter services in this case in the sum of $120.33. The bill appears reasonable for the services rendered and is hereby allowed.

An award is hereby rendered in favor of Gray Brewer in the sum of $120.33.

(No. 4191—Claimant awarded $3,973.34.)

ELMER A. BELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

***Opinion** filed March 7, 1950.*

FRANCIS P. FLYNN, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where award will be made under.* Where an employee of the Department of Public Works, Division of, Parks and Memorials, while cleaning up a park wood lot, slipped and fell down a canal bank slope, striking his shoulder on a rock and suffered 75% of loss of use of his right arm, and also 20% of the use of the left leg due to post operative thrombo phlebitis incurred while in hospital under treatment by respondent's physician, an award will be made under the Act.

LANSDEN, J.

Claimant, Elmer A. Bell, seeks to recover under the

provisions of the Workmen's .Compensation Act for injuries that resulted from an accident arising out of and in the course of his employment with the Department of Public Works and Buildings, Division of Parks and Memorials.

On August 24, 1948, claimant, then 71 years of age, married but having no children under 16 dependent upon him for support, was employed as park custodian at Channahon Park, northwest of Channahon, Will County, Illinois. This park is located adjacent to the Illinois-Michigan Canal. While walking along the canal bank in performance of his duties cleaning up the park wood lot, claimant, on that date, slipped and fell down the bank slope, and his right shoulder struck a rock.

About one week after the accident, claimant started having medical treatment by respondent's doctors, which continued for several months. Finally on March 10, 1949, an operation was performed on his shoulder by one of respondent's doctors in an effort to correct the damage to his shoulder which caused sharp pain and marked limitation of motion in his right arm and loss of grip in his right hand. Another reason for the operation was to remove a tumor in the under-arm which probably resulted from intravenous medication administered by one of respondent's doctors.

Shortly after the operation and, while still in the hospital recuperating, a swelling appeared in claimant's left leg below the calf. This trouble was diagnosed as thrombo phlebitis, a not too unusual condition resulting from post-operative confinement. The leg swelling persisted without appreciable improvement and added another disability to that already suffered in the right shoulder and arm.

No jurisdictional questions are involved in this case,

and the questions to be determined are the extent of loss of use of claimant's right arm and left leg as a result of the accident and treatment furnished him by respondent.

The medical testimony in the case is not in fundamental conflict. From such testimony the Court must draw its own conclusions. Claimant contends that industrially he has lost the entire use of his right arm. Respondent does not dispute this too vigorously.

The evidence shows that the condition of claimant's arm and shoulder is static, neither improving nor retrograding. He can raise his arm only 30 degrees from his side; forward motion is only 45 degrees and backward motion is about 10 degrees. Rotation is within normal range and his elbow is unimpaired. His grip is markedly lessened. In addition, portions of the mechanism of his shoulder were removed or altered by the operation performed upon him.

From these facts the Court concludes that claimant has suffered a 75 per cent loss of use of his right arm.

The case of *Mandel Bros.* v. *Ind. Com.,* 359 Ill. 405, is rather analogous on the facts with this case, and the court in that case approved an award of the Industrial Commission for 66 2/3 per cent loss of use of the injured man's arm.

The Court cannot agree with the contention of claimant that industrially he has lost the entire use of his right arm.

In *Bell & Zoller Mining* Co. v. *Ind. Com.,* 322 Ill. 395, at page 402, the Court said:

"Complete and permanent loss of the use of the right arm means that he is not able to make use of it in any character **of** employment to earn wages. It is not sufficient to show that the use of the arm is so impaired that he can never use it to perform the work that he formerly

performed in the mines or a use of the pick and shovel in mining and loading coal."

As to the per cent of loss of use of claimant's left leg, the testimony shows that there has been little fundamental improvement since the thrombo phlebitic condition arose except for such benefits that he received from hospital treatment. This condition limits to two or three hours per day the time claimant can be on his feet, and he has difficulty in climbing flights of stairs and, after standing for some time, his left leg weakens and becomes numb and tired.

That claimant's leg condition is due to the treatment and operation furnished by respondent, at its request, is conceded by the medical testimony. That, under such circumstances, respondent is liable has been determined in *Kivish* v. *Ind. Com.*, 312 Ill. 311, and *Lincoln Park Coal* Co. v. *Ind. Com.*, 317 Ill. 302.

The Court, therefore, concludes that claimant is entitled to an award for 20 per cent loss of use of his left leg.

Subsequent to his accident, claimant was paid full wages and performed light work for respondent until he was discharged in the late spring of 1949, except for the period of 28 days he was hospitalized because of and convalescing from his operation. For the period he was paid $136.29.

All medical expenses were furnished and paid for by respondent, amounting to $1,019.20.

William J. Cleary & Co., Court Reporters, Chicago, Illinois; were employed to take and transcribe the testimony before Commissioner Young. Charges in the amount of $137.70 were incurred, which charges are reasonable. An award is, therefore, entered in favor of William J. Cleary & Co. for $137.70.

Claimant's earnings in the year prior to his injury amounted to $1,800.00. He is entitled to an award under Section 8 (e) (13, 15, 17) of the Workmen's Compensation Act. His rate of compensation is $19.50 per week.

An award is, therefore, entered in favor of claimant, Elmer A. Bell, for $4,031.63, being the sum of $3,290.63 for 75 per cent loss of use of his right arm, and $741.00 for 20 per cent loss of use of his left leg. During the 28 day period claimant was hospitalized and convalescing from his operation, he was entitled to compensation for temporary total disability amounting to $78.00 yet he was paid $136.29. He was thus overpaid $58.29. The net award is, therefore, $3,973.34.

This award is payable as follows:

$1,560.00 less overpayment of **$58.29** equals **$1,501.71** which has accrued and **is** payable forthwith;

2,471.63 which **is** payable in weekly installments of **$19.50** per week for **126** weeks commencing on March **15, 1950,** plus one final payment of **$14.63.**

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. **4252—Claim** denied.)

RALPH E. TREPANIER, Claimant, *vs.* **STATE OF** ILLINOIS, Respondent.

Opinion filed March 7, 1950.

LINDSCHIN & PUCIN, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where award will be denied under.* Where no notice was given respondent until more than thirty **(30)** days after the accident, failure to comply with Section **20** of the **Act** and award will be denied and motion to dismiss sustained.

NOTICE—*necessity to comply with statute.* Unless employer otherwise has knowledge of the injury, is jurisdictional under Section 24 of the Workmen's Compensation Act.

LANSDEN, J.

Claimant, on December 16, 1949, filed his complaint in this Court, seeking to recover under the Workmen's Compensation Act for injuries allegedly sustained in an accident arising out of and in the course of his employment.

Respondent filed a motion to dismiss based on the ground that no notice was given to respondent until more than thirty days after the accident.

The verified complaint alleges that the accident occurred on July 23, 1949, and notice was served on respondent on September 7, 1949. The following allegations of the complaint explain the reason for claimant's delay in notifying respondent:

"I was asked to take care of Winnebago County at the time of the accident in addition to covering five (5) other counties in Northern Illinois. I worked alone and my superior was located at Springfield. My injury did not appear serious at first and I hoped that the pain would ease up shortly. My vacation occurred the first two weeks in August, during which time I went away for a rest to relieve the pain. When I got home, I found a letter stating that I would be re-placed and continued to remain at home while being treated by Dr. H. Floyd Cannon. It was not until I failed to respond satisfactorily to medical treatment that I finally realized how serious my injury was and requested Dr. H. Floyd Cannon to notify the proper authorities.

The above quoted allegations of the complaint, coupled with others, conclusively show that no superior of claimant had knowledge of the facts and circumstances of the accident until claimant's own doctor notified the State Fire Marshal by a report dated September 7, 1949. No medical, surgical or hospital treatments have been furnished claimant, and no compensation has been paid.

The giving to an employer of notice of the accident within thirty days, unless the employer otherwise has

'knowledge thereof, is jurisdictional under Section 24 of the Workmen's Compensation Act. *Stuenkel* v. *State*, 16 C.C.R. 34; *Powers Storage* Co. v. *Ind. Com.*, 340 Ill. 498; *Pullman* Co. v. *Ind. Com.*, 356 Ill. 43; *Gray* **Knox** *Marble* Co. v. *Ind. Com.*, 363 Ill. 210; *Arrnour* & Co. v. *Ind. Com.*, 367 Ill. 471; *Brown Shoe Co.* v. *Ind. Com.*, 374 Ill. 500.

The verified complaint herein, on its face, shows failure to comply with one of the jurisdictional prerequisites of the Workmen's Compensation Act and the motion of respondent to dismiss must be sustained.

Motion of respondent to dismiss granted and case dismissed.

(No. 4028—Prior award modified.)

DELLA N. CORCORAN, WIDOW, ET AL., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Supplemental opinion filed April 18, 1950.

ROSCOE BONJEAN, Attorney for Claimant.

IVAN **A.** ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where widow* of *deceased employee is not entitled to balance of increase in award, due to child arriving at age of 18 years.* Where widow of **an** employee whose award was increased because of the existence of a minor child and the increase for the child remaining unpaid was $258.12, upon the child arriving at the age of 18 years the unpaid balance of the increase shall become extinguished provided the child is not mentally incapacitated or incompetent.

SCHUMAN, C. J.

An award was entered in this case in an opinion filed November 12, 1947. At the time of the award, the claimant, Della N. Corcoran, widow of Edward J. Corcoran, deceased, and the deceased had one child under 16 years of age. This child was 16 on January 8, 1948, and reached the age of 18 years on January 8, 1950.

Under the terms and provisions of the Compensation Act that when an award has been made, where the deceased left at the time of his death a widow and one child under 16 years of age him surviving, the compensation payments of death benefits to the extent same were increased because of the existence of said child, insofar as they have not been paid, shall come and become extinguished when said child arrives at the age of 18 years, if said child is physically and mentally competent at that time. It has been brought to the attention of the Court that said child is now 18 years of age as of January 8, 1950, and that said child, insofar as the Court knows, is physically and mentally sound and not in any way mentally incapacitated or mentally incompetent.

At the time when the child became 18 years of age, approximately .478 of the award had been paid; .478 of $540.00, the increase for the child, would amount to $258.12, which has accrued and should be added to the $4,800.00 award to the widow, making a total of $5,058.12. Deducting the sum of $2,556.00, already paid, leaves a balance of $2,502.12 to be paid. The award is therefore modified and said sum of $2,502.12 is to be paid at the rate of $18.00 for 138 weeks and one final payment of $18.12.

All future payments being subject to the terms and conditions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically further reserved for the entry of such further orders as may from time to time be necessary.

(No. 4131—Claimant awarded $1,551.10.)

CHARLES D. WOOD, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 23, 1949.

Supplemental Opinion filed April 18, 1950.

WALTER D. BOYLE, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM J. COLOHAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where award will be made under.* Where an employee of the Division of Highways was requested by his superior to use his personal car to deliver gasoline to a stalled snow-plow, and while returning from the delivery, his vehicle was struck by a private vehicle, and claimant's right leg and left arm were injured, an award will be made under the Act.

WORKMEN'S COMPENSATION ACT—*where award will be reduced in amount.* Where an award was made to an injured employee of the Division of Highways, and the employee subsequently recovered $300.00 in settlement from the tort feasor, the amount of the award will be reduced by the amount of the settlement.

LANSDEN, J.

Claimant, Charles D. Wood, seeks to recover under the provisions of the Workmen's Compensation Act for a period of temporary total disability, and for partial loss of use of both his right leg and left arm, as a result of an accident arising out of and in the course of his employment in the Department of Public Works and Buildings, Division of Highways. The departmental report on file in this case reads in part as follows:

"At approximately 8:00 P.M. on December 31, 1947, Mr. Wood was called out to operate a snow plow for the purpose of keeping certain sections of State maintained highways open to traffic during a snow storm. Mr. Wood continued to operate the plow throughout the night and until approximately 11:00 A.M. on January 1, 1948, when he was relieved. At about 11:30 A.M. this same day, Mr. Wood's superior, Marvin McKirgan, called at

the Wood home and requested Mr. Wood to take his personal car, a 1938 Ford sedan, secure some gasoline, and take it to a Division snow plow truck which had become stalled in a ditch filled with snow about six miles east of the village of Henry on Illinois marked Route No. 18 in Putnam County. Mr. Wood delivered the gasoline to the stalled truck and plow, assisted in removing them from the ditch, and got into his car to return home. He had turned his car around and traveled easterly but a short distance when, due to the severity of the storm, heavy snow and wind, he was compelled to stop and remove the excess snow from the windshield of his car.

"Just as his car came to a stop it was struck by a car approaching from the east and driven by Mr. Allen Ash of R.F.D. No. 4, Peoria. The force of the impact practically demolished both cars, and Mr. Wood received the injuries complained of."

Oral testimony at the hearing before Commissioner Young confirms the above.

The uncontradicted medical testimony of Dr. B. W. Dysart of Henry, Illinois, attending-physician, indicates that claimant has a 25 per cent loss of use of his right leg, and 15 per cent loss of use of his left arm.

There are no questions in the record as to claimant's compliance with all the jurisdictional requirements of the Workmen's Compensation, Act, and claimant is therefore entitled to an award under Section 8(e) thereof.

Jennie Miglio, Hennepin, Illinois, was employed to take and transcribe the evidence before Commissioner Young. Charges in the amount of $30.00 were incurred for such services, which charges are fair, reasonable and customary, and an award is therefore entered in favor of Jennie Miglio for such amount.

Claimant is 45 years of ago, married, and had three

children under 16 years of age dependent upon him for support on the date the accident occurred. His rate of pay was such as to entitle him to the maximum under the Workmen's Compensation Act. All medical services have been paid for by respondent.

An award is therefore entered in favor of claimant, Charles D. Wood, in the amount of $1,961.42 less the sum of $110.32, .payment for non-productive time, or $1,851.10, all of which is accrued arid is payable forthwith, and is made up as follows:

2 4/7 weeks temporary total disability at $23.40 per week, or...	$ 60.17
25 per cent of 190 weeks times $23.40 for the partial loss of use of his right leg, or..	1,111.50
15 per cent of 225 weeks times $23.40 for the partial loss of use of his left arm, or..	789.75
	$1,961.42
Less overpayment for non-productive time.	110.32
	$1,851.10

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

SUPPLEMENTAL OPINION

LANSDEN, J.

On September 23, 1949, an award was entered by this Court in favor of claimant, Charles D. Wood, in the amount of $1,851.10 under the provisions of the Workmen's Compensation Act.

Subsequently thereto respondent filed a petition to vacate or modify said award for the reason that claimant as a plaintiff in an action against one Alan L. Ash in the Circuit Court of Putnam County, 'Illinois, was paid the sum of $300.00 in settlement of an action at

law brought by claimant for injuries arising out of the same accident for which he brought his action in this Court.

Claimant answered respondent's petition admitting that the amount of $300.00 had been paid to claimant herein.

Upon consideration of the petition and answer thereto, it is the conclusion of this Court that the award in favor of claimant, Charles D. Wood, should be reduced by $300.00, the same being the amount he received in settlement of his action at law in the Circuit Court of Putnam County, Illinois.

The next to the last paragraph of our opinion filed herein on September *23,* 1949, is hereby stricken and in lieu thereof is substituted the following paragraph :

An award is therefore entered in favor of claimant, Charles D. Wood, in the amount of $1,961.42 less the sum of $110.32, payment for non-productive time, and further less the sum of $300.00 paid to claimant in settlement of his action in the Circuit Court of Putnam County, Illinois, or $1,551.10, all of which is accrued and is payable forth'-with, and is made up as follows :

2 4/7 weeks temporary total disability at $23.40 per week, or...	$ 60.17
25 per cent of 190 weeks times $23.40 for the partial loss of use of his right leg, or..	1,111.50
15 per cent of 225 weeks times $23.40 for the partial loss of use of his left arm, or..	789.75
	$1,961.42
Less overpayment for non-productive time.	110.32
	$1,851.10
Less amount received in settlement of an action at law in the Circuit Court of Putnam County, Illinois	300.00
	$1,551.10

(No. 4184—Claim denied.)

JOSEPH DYBALA, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 195'0.

Petition of Claimant for rehearing denied April 18, 195'0.

IRVING M. GREENFIELD, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM J. COLOHAN AND WILLIAM H. SUMPTER, Assistant Attorneys General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where award will be denied under.* Where an employee of the Division **of** Highways, while engaged on **August 27,** 1948, in removing trees, and was pinned to a signpost by **a** truck which rolled backward, and was treated at home until September 6, 1948, when he was discharged as able to work, never having complained to respondent's physician of pain in abdominal region, his claim for compensation due to a hernia will be denied.

LANSDEN, **J.**

Claimant, Joseph Dybala, seeks to recover under the Workmen's Compensation Act for total permanent disability allegedly resulting from an accident that occurred on August 27, 1948. Dybala on that date was employed as a common laborer in the Division of Highways, Department of Public Works and Buildings, and, while working at his assigned job of hooking a chain to the rear of a State truck, which chain was attached to a small tree to be pulled out, the truck rolled backward and pinned him between the rear of the vehicle and a signpost. Upon being released, Dybala was rushed to a hospital where he was treated, X-rayed and his abrasions and contusions dressed. He went home that evening and was treated until September 6, 1948, when he was discharged as able to work.

Dybala returned to work on September 9, 1948, and worked his regular hours, although as he states, at light work, until early in March, 1949, when he was discharged.

Later in that month he was examined by a doctor who discovered an inguinal hernia and a chronic myocarditic condition.

Dybala filed his complaint shortly thereafter. No jurisdictional questions are before us by reason of a stipulation of counsel, but we must decide whether on the evidence in the record, claimant is entitled to an award.

First, however, we must dispose of an issue which must be decided, although not stressed by counsel for either party. Claimant's present physical condition on the evidence is such that he is apparently totally and permanently disabled by a combination of his hernia and his chronic myocarditic condition. The record is silent, however, on the point of whether his heart condition in and of itself is sufficient to render Dybala totally and permanently disabled. We must, therefore, assume that, his heart condition is a contributory but not crucial fact. Therefore, unless Dybala is entitled to recover for his hernia, the proof about his heart condition alone will not support an award for total permanent disability.

Claimant testified as to the circumstances of the accident. He further testified that he had continuous pain in the region of his groin and that he was often nauseated. He also testified that the truck struck him in the abdominal region, and that he had never had any hernia before.

Claimant's doctor testified in bis behalf. This doctor, who examined Dybala twice in March and June, 1949, stated that the inguinal hernia and chronic myocarditis from which he found Dybala to be suffering, were such as to make Dybala a poor operative risk and that an operation to correct the hernia would be a 'substantial hazard to claimant's life. He further testified that the

hernia was of recent origin, basing this opinion on its size and development and also an the presence of muscle spasticity in the lower abdomen and tissue tenderness. Claimant's doctor further testified that sometimes protrusion of the hernial sac into the inguinal canal did not occur immediately but that when it did pain was present. He also stated that a hernia would fall into the inguinal canal within a week or ten days after the injury in this type of case.

The doctor who treated Dybala on the date of the accident and until he was discharged from further treatment as able to work on September 6, 1948, testified for respondent. This doctor unequivocally stated that Dybala never complained to him of pain in the abdominal region and that he bandaged Dybala in such a way around his chest in connection with the abrasions and the possible injuries to his chest and ribs that his breathing would be altered so that, if Dybala had a hernia resulting from the accident pain would have been present. Dybala was thus bandaged for ten days and his manner of breathing was for that time known as "abdominal breathing," and, of necessity, put a strain on muscles of the groin as well as other muscles of the abdominal area.

Respondent's doctor stressed the fact that Dybala's complaints related only to his chest, arms and his difficulty in breathing, and categorically stated that he never complained of pain below the belt line on any of the four different days he was treated commencing with the date of the accident and ending on September 6, 1948. This doctor did admit that he never examined Dybala's groin.

Other than the original accident report which was introduced in evidence by respondent without objection, the Division of Highways had no other record of any complaint from claimant until his complaint was filed

in this case. It is of some significance that the space on the printed report relating to hernia was left blank, and the form provided that, if hernia was involved, a special form was to be filled out.

Section 8 (d-1) of the Workmen's Compensation Act provides:

"An injured employee to be entitled to compensation for hernia, must prove:

1. The hernia was of recent origin;
2. Its appearance was accompanied by pain;
3. That it was immediately preceded by trauma arising out of and in the course of employment;
4. That the hernia did not exist prior to the accident."

Each of the four enumerated conditions must be proven by a preponderance of the evidence. *Cuneo Press* Co. v. *Ind. Com.*, **341** Ill. 569; Joyce *Bros. Storage* Co. v. *Ind. Com.*, **399** Ill. **456.**

Even if we assume that conditions **1, 3** and **4** have been met, we feel that condition 2 has not been proven by a preponderance of the evidence. In fact, the evidence strongly preponderates, as regards condition **2,** in favor of respondent.

Claimant's doctor states that Dybala's type of hernia would protrude into the inguinal canal within ten days and when it did sharp pain would be experienced. Respondent's doctor treated Dybala for ten days and at no time did Dybala complain of pain in his groin, even though his chest was bandaged in such a way as to accentuate any pain he might have in the region of his groin.

Other facts above set forth further tip the scales in favor of respondent, and an award must, therefore, be denied.

The legislature has made hernia the subject of special provisions and exceptions under the Workmen's Compensation Act. None of the above quoted require-

ments can be ignored. Proof must be made of the concomitant circumstances and conditions prescribed by the statute. To grant an award in this case would tend to nullify the special statutory provision and place claims for hernia in an identical position with, if not preferred position over, other compensable claims. *Mirific Products* Co. v. *Ind. Corn.,* 356 Ill. 645.

Rothbart and Sewell, Court Reporters, Chicago, Illinois, were employed to take and transcribe the testimony before Commissioner Summers. Charges in the amount of $72.55 were incurred, which are reasonable and customary, and an award is, therefore, entered in favor of Rothbart and Sewell for such amount.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4224—Claimant awarded **$1,385.41.)**

ROY S. VANCIL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 18, 1950.

R. WALLACE KARRAKER, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

CIVIL SERVICE **EMPLOYEE** RESTORED TO *POSITION—Where entitled to recovery for wages while under suspension and after discharge.* Where a civil service employee at the State Hospital at Anna, Illinois, was suspended for the alleged abuse of a patient, and was subsequently discharged for the same reason, and while a hearing on his discharge was pending before the Civil Service Commission, held himself ready, willing and able to perform his duties, and the Commission found that he was not discharged for just reason, he is entitled to an award for his salary during the period of his discharge.

SCHUMAN, C. J.

The claimant, Roy S. Vancil, a civil service employee

of the Department of Public Welfare of the State of Illinois, was employed at the State Hospital at Anna, Illinois, as an attendant. On October 20th, 1948, under the charge of "alleged to have been abusive to a patient by the name of Milo Garavoglia", claimant was suspended for 30 days until November 20, 1948.

On November 18, 1948 claimant was served with notice of discharge effective November 20, 1948 on the same ground used for his suspension. Claimant requested a hearing by the State Civil Service Commission and on the 25th day of July, 1949, said Commission found that claimant. was not discharged for just cause and ordered that he be immediately reinstated to his certified position of attendant at the Anna State Hospital. In accordance with the order of the Civil Service Commission, claimant returned to service as of July 25, 1949. Claimant's salary at date of suspension was $175.00 a month. From the record the only deduction that can be made is that claimant had been diligent in the protection of his own rights, and at all times for which he-seeks payment of salary, he was ready, willing and able to perform the duties of his position, tendered performance thereof, and such tender was refused. These facts have to be taken as true as no affirmative defenses were offered to the contrary.

Under the holdings of this Court in *Clay Wilson* vs. *State of Illinois,* 12 Court of Claims 413, and *Herman Drezner* vs. *State of Illinois,* 15 Court of Claims 16, the claimant is entitled to an award.

The evidence shows that claimant is entitled to recover the amount set forth in his complaint, being $1,385.41.

An award is therefore entered in favor of the claimant in the sum of $1,385.41.

(No. 4245—Claim denied.)

HANS **A.** HEXDALL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed ***April*** *18,* **3950.**

ROOT & HOFFMAN, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION *Am—where claim filed is too late to give court jurisdiction under.* Where an employee of the Division of Highways seeking to recover for permanent partial disability filed his claim more than one (1) year after the last payment of compensation, such claim does not comply with Section 24 of Act and the Court does not have jurisdiction.

LANSDEN, **J.**

On November **23,** 1949, claimant, Hans A. Hexdall, filed his complaint under the Workmen's Compensation Act, seeking to recover for permanent partial disability, as a result of an accident arising out of and in the course of his employment with the Department of Public Works and Buildings, Division of Highways.

The accident allegedly occurred on December 10, 1947, and the complaint, in part, states as follows:

(d) State whether medical, surgical and hospital treatment were furnished by Respondent, and if so to what extent: Respondent has furnished medical and hospital treatment to claimant up to present date. (November 21, 1949) . . . . . .

(f) Amount of payments, if any, received from Respondent during period of Claimant's disability; and any other action taken by Respondent: Claimant didn't lose a day's pay. Went back on job one month after accident. Discharged March 15, 1949.

On the basis of the allegations in the complaint, especially those above quoted, respondent has filed a motion to dismiss, asserting that claimant has filed his complaint too late and that, therefore, this Court is without jurisdiction to entertain it.

Because Section 8D of the Court of Claims Act pro-

vides that this Court shall determine all claims for personal injuries or death arising out of and in the course of employment of any State employees in accordance with the substantive provisions of the Workmen's Compensation Act, claimant argues that Section 24 of the latter act is procedural and not substantive. Therefore, this Court is governed not by said Section 24 with its one-year limitation but by the two-year limit in Section 22 of the Court of Claims Act.

Claimant cites two cases which hold that Section 24 of the Workmen's Compensation Act is procedural and not substantive. *Diamond T Motor Car* Co. v. *Ind. Com.*, **378** Ill. 203; *Hilberg* v. *Ind. Com.*, 380 Ill. 102. With the holding of those cases, there can be no disagreement.

But what claimant has failed to perceive is that any distinction between procedure and substance in so far as this case is concerned is immaterial. What is really involved is the jurisdiction of this Court to hear this case.

Section 22 of the Court of Claims Act reads as follows:

"Every claim cognizable by the court and not otherwise sooner barred by law shall be forever barred from prosecution therein, unless it is filed with the clerk **of** the court within two years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues two years from the time the disability ceases."

It is settled beyond any further argument that said Section 22 is jurisdictional and that unless a claim is filed within the time prescribed therein this Court has no jurisdiction of the case. *Ross* v. *Rtate,* 16 C.C.R. 116; *Schuemann et al., etc.*, v. *State,* 17 C.C.R. 132; *Brown* v. *State,* 17 C.C.R. 79. In this Court, failure to file a complaint in time is not a matter of affirmative defense, failure to plead which may result in a waiver thereof.

Rule 32 of the rules of this Court reads identically

with said Section 22 except that after the word "law" appears an asterisk which refers to the following explanatory statement: "See limitation provisions of specific statutes, including Workmen's Compensation and Occupational Diseases Act."

Section 24 of the Workmen's Compensation Act provides a one-year limitation for filing claims. It has uniformly been held to be jurisdictional in numerous cases of which *Black* v. *Ind. Corn.,* 393 Ill. 187, is one.

Said Section 24 applies to this Court and operates to reduce the period prescribed in said Section 22 if the facts warrant it, and is likewise jurisdictional. *Scott* v. *State,* 12 C.C.R. 163; *Britt* v. *State,* 16 C.C.R. 114; *Stallard* v. *State,* 16 C.C.R. 78; *Stuenkel* v. *State,* 16 C.C.R. **34;** *Rathje* v. *State,* 16 C.C.R. 177; *Clark* v. *State,* 17 C.C.R. 117; *Domianus* v. *State,* 17 C.C.R. 197.

In this case, claimant was injured on December 10, 1947. Conceding that respondent had notice of the accident within **30** days and that the payment of his full salary with such knowledge constituted a payment of compensation for the period claimant was unable to work, such compensation payments ceased not later than January 15, 1948. Said Section 24 grants a claimant one year from the date of the last payment of compensation within which to file his claim. By delaying until November 23, 1949, to file his claim, this claim comes much too late.

The furnishing of first aid, medical and surgical services by respondent is of no benefit to claimant, for, by Section 8 (a) of the Workmen's Compensation Act, "the furnishing of any such services . . . by the employer shall not be construed as the payment of compensation."

Upon the authority of the above cited decisions of this Court, which we follow, we held that, claimant having

filed his complaint more than one year after the date of the last payment of compensation, this Court is without jurisdiction to hear it.

This opinion has been extended to some lengths primarily for the purpose of demonstrating the uniformity with which this Court has passed upon the questions involved. Almost every volume of the Court of Claims Reports contains cases deciding the questions as decided herein.

The motion of respondent to dismiss must be and is hereby sustained.

Case dismissed.

(No. 4254—Claimant awarded $7,500.00.)

MARY E. SEATON, WIDOW, ET AL., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 18, 1950.

GRAHAM & PRENTISS, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award will be made for accidental death.* Where a State police officer, driving a State vehicle on an assignment to a location where he was to assist a truck weighing detail, and he was killed in a collision with another vehicle, and was survived by three (3) total dependents, his widow and two (2) minor children, an award was allowed to his widow in the sum of $7,500.00.

LANSDEN, J.

Claimant, Mary E. Seaton, widow of Ben R. Seaton, deceased, brings this action to recover under the Workmen's Compensation Act for the death of her husband, an employee of respondent, in an accident that arose out of and in the course of his employment as a State police officer in the Department of Public Safety.

All jurisdictional requirements have been complied with and the uncontroverted facts disclose that the deceased, on October 24,1949, was assigned to drive a State vehicle from Keithsburg, Illinois, to Oneida, Illinois, where he was to assist a detail engaged in weighing trucks. At approximately 4:00 P.M. on that day, the car deceased was driving collided with another vehicle while traveling in an easterly direction on State Aid Route No. 2, near Oneida, Illinois. Deceased was almost instantly killed.

Respondent has made no payments as a result of the deceased's accidental death.

At the time of decedent's death, his widow, Mary E. Seaton, and his two minor children, Neil D., born February 8,1941, and Mary Constance, born August 30,1944, were totally dependent upon him for support. Deceased's earnings from respondent in the year preceding his death amounted to $2,910.58.

Claimant is entitled to an award under Section 7 (a), (h) (3), (L) of the Workmen's Compensation Act in the sum of $7,500.00, payable at the rate of $24.00 per week.

Mrs. George O. Hebel, Aledo, Illinois, was employed to take and transcribe the testimony before Commissioner Wise. Charges in the amount of $23.90 were incurred, which charges are reasonable and proper. An award is, therefore, entered in favor of Mrs. George O. Hebel in the amount of $23.90.

An award is entered in favor of claimant, Mary E. Seaton, in the amount of $7,500.00, to be paid to her as follows :

$ 603.43, which has accrued-and is payable forthwith
$6,896.57, payable in weekly installments of $24.00 beginning on April 25, 1950, for a period of 287 weeks, plus one final 'payment of $8.57.

All future payments being subject to the conditions

of the Workmen's Compensation Act, jurisdiction of this case is specifically reserved for the entry of such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 3025—Claimant awarded $2,316.09.)

ELVA JENNINGS PENWELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 9, 1950.

JOHN W. PREIHS, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award for compensation under may be made.* Where an employee, seriously injured in his employment, becoming temporarily blind and generally paralyzed, and after being awarded sums for total permanent disability and for medical, surgical and hospital services to the time of the award; and where further awards have been made to the employee for necessary medical and nursing expenses, and where she remains in a paralyzed condition, requiring almost constant nursing attention, and almost daily attention by a physician, a further award will be made upon the employee's paid vouchers for such services rendered to date from the period of the last award.

DELANEY, J.

Claimant was injured on February 2, 1936, in an accident arising out of and in the course of her employment as a supervisor at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. The injury was serious, causing temporary blindness and general paralysis. The facts are fully detailed in the case of *Penwell* v. *State,* 11 C.C.R. 365, in which an award was made to the claimant of $5,500.00 for total permanent disability, $8,215.95 for necessary, medical, surgical, and hospital

services expended or incurred to and including October 22,1940, and an annual pension of $660.00. On February 10,1942, a further award was made to claimant for medical and hospital expenses incurred from October 22, 1940, to January 1, 1942, in the amcunt of $1,129.82. On March 10, 1943, a further award was made to claimant for medical and hospital expenses from January 1, 1942, to December 31, 1942, in the amount of $1,164.15. On March 15, 1944, a further award was made to claimant for medical and hospital expenses from January 1, 1943, to and including September 30, 1943, in the amount of $853.07. On April 17, 1945, a further award was made to claimant for medical and nursing expenses incurred from October 1,1943, to and including February 28, 1945, in the amount of $1,955.29. On September 12, 1946, a further award was made to claimant €or medical and nursing expenses incurred from February 28, 1945, to and including April 1, 1946, in the amount of $1,646.12. On June 5, 1947, a further award was made to claimant for medical and nursing expenses incurred from April 1, 1946, to and including April 1, 1947, in the amount of $2,108.30. On September 22, 1948, a further award was made to claimant for medical and nursing expenses incurred from April 1, 1947, to and including April 1, 1948, in the amount of $2,207.80. On April 19, 1949, a further award was made to claimant for medical and nursing expenses incurred from April 1, 1948, to and including February 1, 1949. Claim is now being made for an additional award of $2,316.09 for medical and nursing expenses from February 1, 1949, to and including February 1, 1950.

Claimant remains totally paralyzed from the waist down, the paralysis being of a spastic type; her physical condition has not improved. She has no control over her

lower limbs, nor over her urine and fasces. From April 1, 1948, to and including February 1, 1949, she has been required, to relieve her of her injury, and to prevent deformity and to stimulate circulation, and for relief of bed sores, to employ and receive medical services and nursing attention. She remains helpless, requiring the services of nurses or attendants to move her to and from her bed, to change her bed clothing at least three or four times a day, to administer light treatment to the affected parts of her paralyzed body, and to rub her body with ointments prescribed by her physician. Because of the complete paralysis of her lower abdomen and legs, the functioning of her kidneys and bladder is impaired, and medical attention is required to flush these organs and to prevent infection arising from her impaired circulation and paralysis. The services of a physician are needed almost daily and must be rendered at her home.

Claimant has, therefore, employed a physician on a monthly basis at a charge of $90.00 per month, which is a lesser rate than ordinarily charged, and for massage treatment, and for which she seeks reimbursement, in the total sum of $1,103.00. Claimant also seeks reimbursement at the rate of 75 cents per day in the amount of $273.75 for room and board of attending nurses. Such expenditure obviates the employment of both a day and night nurse. In addition, claimant has expended, for nursing services, $777.60, and for drugs and supplies, $161.74. She has submitted to the Court, with her verified petition, the original receipts and vouchers showing payment of these respective items.

Award is, therefore, made to the claimant for medical and nursing expenses from February 1, 1949, to and including February 1, 1950, in the sum of $2,316.09,

which has accrued and is payable forthwith. The Court reserves for future determination claimant's need for further medical, surgical and hospital services.

(No. 4140—Claimant awarded $325.00.)

CLAUDE LAVENDER, Claimant, *vs.* STATE OF **ILLINOIS,** Respondent.

Opinion filed May *9, 1950.*

THOMAS B. F. SMITH, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award for compensation under may* be *made.* Where an employee of the Division of Highways, carrying a can of molten material slipped and fell, splashing the contents on his hands, forearm and face, burning these areas in varying severity, and scarring his face and arm, an award will be made for disfigurement and for temporary disability.

DELANEY, J.

Claimant, Claude Lavender, was employed on December **11,** 1947, as a laborer by respondent in the Division of Highways. On that day while carrying a partially filled can of molten bituminous material claimant stepped on some freshly poured material, lost his balance and fell on the pavement, and the molter? contents of the pouring can splashed on his hands, forearm and face. He was taken to Dr. V. H. Burkhart at Hurst, Illinois. Dr. Burkhart reported that he had received first degree burns of the face, second degree burns on his left forearm and hand, and third degree burns of the right forearm and hand.

On November **30, 1948,** the claimant was examined by Dr. John S. Lewis, who state-d claimant's disability is due to disfigurement caused by the resultant scar from his burn.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of employment.

The record consists of the complaint and departmental report and statement, brief and waiver of claimant.

From the evidence in this case and an examination of the scars by Commissioner Summers, the claimant should receive from the respondent for disfigurement to right hand and face twenty-five percent (25%) of the amount paid, under Section 8, Paragraph C, Workmen's Compensation Act. The Division of Highways has paid Mr. Lavender temporary disability at the rate of $18.00 a week from December 12, A.D., 1947, to February 15, A.D., 1948, inclusive, a total of $169.71. The bill of Dr. Burkhart for treating Mr. Lavender amounting to $72.00 was paid by the Division of Highways. Claimant is, therefore, entitled to an award computed under Section 8, Paragraph C, Workmen's Compensation Act, as amended, in the sum of $325.00, all of which has accrued and is payable forthwith.

Genevieve Farmer, Court Reporter, has filed a bill for reporter services in this case in the sum of $15.25. The bill appears reasonable for the services rendered and is hereby allowed.

An award is hereby rendered in favor of Genevieve Farmer in the sum of $15.25.

Genevieve Farmer, Court Reporter, has filed on record a bill for reporter services at a hearing to take additional testimony in this cause, in the sum of **$22.58.** The bill appears reasonable for the services rendered and is hereby allowed.

An award is hereby rendered in favor of Genevieve Farmer in the sum of $22.58.

This award is subject to the approval of the Governor as provided in Section 3 of ‘,‘An Act concerning the payment of compensation awards to State employees.’’

(No. 4169—Claim denied.)

JOHN G. SANDERS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 9, 1950.

LAWRENCE B. MOORE, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award will be denied under.* Where an employee of the Division of Highways, whose clothing caught fire when using a kerosene torch, resulting in severe burns of his right leg which required skin grafts was denied award because he had failed to file claim within one (1) year after the last payment of compensation, which failure operated to divest this court of jurisdiction.

JURISDICTION—*where respondent's failure to raise question of court's jurisdiction will be made on the court's own motion.* Where the State failed to raise question of court's jurisdiction, such question can and must be raised by the court on its own motion.

LANSDEN, J.

Claimant, John G. Sanders, seeks to recover from respondent under the Workmen's Compensation Act for injuries sustained in an accident that arose out of and in the course of his employment in the Department of Public Works and Buildings, Division of Highways.

On May 8, 1947, the clothing of claimant, who was using a kerosene torch, accidentally caught on fire and as a result he suffered severe burns to his right leg from his ankle to his hip. Respondent furnished all medical and hospital services to claimant at a cost to it of

$1,992.21. Two skin grafts were required, and the record discloses that the skin grafts were highly successful.

Claimant was paid $491.12 compensation at the rate of $18.00 per week from May 9, 1947, up to and including November 15, 1947, during the period he was totally and temporarily disabled. No other payments of compensation were made to claimant.

Shortly after November 15, 1947, claimant returned to work at a lighter, easier job that did not require him to be on his feet. Claimant worked almost continuously until he was discharged in March, 1949.

On February 23, 1949, claimant filed his claim in this Court. His complaint was dismissed on motion of respondent on the ground that under Section 24 of the Workmen's Compensation Act his failure to file his claim within one year after the last payment of compensation operated to divest this Court of jurisdiction.

Leave was granted claimant to file an amended complaint, which was done on April 5, 1949. The only addition to the complaint was an allegation to the effect that respondent had furnished medical 'services to claimant as late as November 16, 1948, and on claimant's theory this operated to extend the date within which he was required to file his complaint.

For reasons best known to him, counsel for respondent failed to plead to the amended complaint, and, under Rule 11 of the rules of this Court, a general denial was deemed to have been filed.

A hearing was held before Commissioner Wise on January 18, 1950. The evidence showed that claimant had been furnished medical services by respondent in April and November, 1948, which consisted primarily of a re-examination and check up by a St. Louis specialist.

Although respondent has failed to raise the question

of this Court's jurisdiction of this case, such question can and must be raised by the Court of its own motion. *Flynn* v. *State*, No. 4209, opinion filed December 7, 1949.

Under Section 24 of the 'Workmen's Compensation Act, a complaint must be filed within one year from the date of the last payment of compensation, otherwise this Court is without jurisdiction to hear the case. Such has been the uniform and undeviating holding of this Court. A recent decision of this Court, which we follow, so holds and collected therein are numerous previous decisions of this Court. *Hexdall* v. *State*, No. 4245, opinion filed April 18, 1950. Such case discusses and rejects contentions similar to those made by claimant herein.

But claimant's principal contention is that the furnishing of medical services is the payment of compensation. Such is not and has not been the case in this State since 1925. Section 8 (a) of the Workmen's Compensation Act specifically provides that' the furnishing of medical services "shall not be construed as the payment of compensation.'' *Madsen* v. *Ind. Com.*, 383 Ill. 590; *Lewis* v. *Ind. Com.*, 357 Ill. 309.

Implicit in this record, however, is another contention of claimant to the effect that, since he returned to work at different, easier and lighter duties, the payments made to him were compensation payments and not payment of wages.

Although such payments were at a rate greater than claimant's rate of compensation, claimant has nowhere in the record evidenced a desire to reduce the award he seeks by such manifest overpayments.

But we hold that claimant was paid wages for what he did, not compensation. Neither the Supreme Court nor this Court, so far as we have been able to ascertain after an extensive search, has expressly passed on the

question. However, we are not unmindful of the fact that specialists in the Illinois Workmen's Compensation Act are generally of the opinion that, if any services are performed, payments are to be construed not as compensation but as wages. We are inclined-to agree with this view, for we can well see that an unlimited field of additional disputes would be opened up under the **Act.** Certainty is a desideratum, the effect of which in the long run operates beneficially on both employers and employees.

In view of the foregoing, claimant is not entitled to an award because this Court has no jurisdiction to hear his case.

Esther Farrington, Paris, Illinois, was employed to take and transcribe the testimony before Commissioner Wise. Her charges of $26.40 are reasonable, and an award is entered in her favor for such amount.

This award is subject *to* the approval of the Governor as provided in Section **3** of "An Act concerning the payment of compensation awards to 'State employees.''

Award to claimant denied.

(No. 4209—Claim denied.)

FLORENCE M. FLYNN, ADMX., ET AL., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 7, 1949.

Supplemental Opinion filed May 9, 1950.

JAMES R. REILLY, Attorney for Claimant.

IVAN **A.** ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PLEADINGS—*when motion to strike will be denied for failure to file within sufficient time.* The rules of this court provide that respondent has thirty days after the filing **of** a complaint within which to file an

answer or a motion, and if a motion is filed and denied, respondent has thirty days thereafter to file an answer; and where a motion to strike is filed more than thirty days subsequent to the filing **of** the complaint, respondent is held to have filed a general traverse or denial.

BURDEN OF PROOF—*pleadings are* insufficient *as proof.* Where claimant, Administrator of the estate **of** a deceased, a patient at the Peoria State Hospital, filed a complaint for wrongful death of the deceased, and at the hearing offered no evidence, but maintained that his complaint stated a prima facie case, the award will be denied, because the claimant has the burden of proving his case by a preponderance of the credible evidence.

LANSDEN, **J.**

On July 6, 1949, a complaint was filed in this Court seeking to recover from respondent the sum of $2,500.00 for the wrongful death of James A. Flynn, a patient at the Peoria State Hospital, which death was alleged to have resulted from the negligence of the agents and servants of respondent.

Paragraph 5 of the complaint alleged that a coroner's inquest was held in Peoria County which inquired into the circumstances attending the death of said James A. Flynn, and said paragraph further contains the allegations that the death of said James **A.** Flynn was found by the coroner's inquest to be due to injuries received in a fall over a stairway banister on the third floor of one of the buildings of said Peoria State Hospital as a result of which fall James **A.** Flynn sustained injuries which caused his death the following day.

Paragraph 6 of said complaint quotes from the findings of the coroner's jury, which in substance state that open stairways at the Peoria State Hospital are a dangerous hazard to all patients **at** the hospital, and the jury recommends that the stairways be enclosed in the future for the safety of all patients.

On September 16, 1949, more than thirty days subsequent to the filing of the complaint, respondent filed

a motion to strike the complaint for the reason that the allegations of paragraphs 5 and 6 as above set forth are improper and are pleaded in contravention of Ill. Rev. Stat. 1949, Chap. 31, Sec. 19, which in substance provides that neither the coroner's verdict nor a copy thereof shall be admissible in any civil action as evidence to prove or establish any of the facts in controversy.

Respondent has called up this motion to strike for determination by the Court, and claimant has filed a brief in opposition to the motion to strike.

A written opinion is being filed herein for the sole purpose of informing practitioners before this Court of the interpretation given to the rules of this Court, specifically Rules 11 and 24.

Aside from the fact that respondent's motion to strike-is not directed to the entire complaint but only to two paragraphs thereof, and on the basis of said motion only those two paragraphs could be stricken if the motion mere granted, respondent's motion has been filed too late.

Rule 11 of this Court provides that respondent shall answer within thirty days after the filing of the complaint and further provides that if respondent fails to answer "a general traverse or denial of the facts set forth in the complaint shall be considered as filed.''

Rule 24 of this Court, among other things, provides that if a motion to dismiss is denied, respondent shall plead within thirty days thereafter.

This Court does hereby construe Rules 11 and 24 to mean that respondent has thirty days from the filing of the complaint to file either an answer to the complaint or a motion directed against the cornplaint. If respondent fails to file either a motion or an answer directed against the complaint within thirty days after the filing

thereof, respondent is held to have filed a general traverse or a denial of the facts set forth in the complaint and cannot after the expiration of the thirty day period raise questions by motion which could have been raised by a motion filed within the thirty day period. However, the jurisdiction of the Court to hear and determine a particular case may be raised at any time.

We do not intend by anything said herein to express an opinion at this time as to the admissibility of the facts pleaded in paragraphs 5 and 6 of the complaint in view of Ill. Rev. Stat. 1949, Chap, 31, Sec. 19, but we do hold that this case is at issue and ready for assignment to a Commissioner for hearing.

The motion of respondent to strike the complaint, having been filed too late, is hereby overruled.

SUPPLEMENTAL OPINION

LANSDEN, J.

Claimant, Florence M. Flynn, Administrator of the Estate of James A. Flynn, deceased, on July 6, 1949, filed a complaint in this Court in which she sought to recover the sum of $2,500.00 for the wrongful death of claimant's intestate, a patient at the Peoria State Hospital.

Previously an opinion was filed in this case, *Flynn* v. *State*, No. 4209, opinion filed December 7, 1949, in which we discussed the effect of the failure of respondent to plead within the 30 day period allowed by Rules 11 and 24 of the rules of this Court. We held that the case was at issue and that respondent was deemed to have filed a general traverse or denial of the facts set forth in the complaint. The case was thereupon assigned to Commissioner 'Wise for hearing.

On March 21, 1950, such hearing was scheduled at the Peoria County Court House, Peoria, Illinois. Counsel for both parties appeared before Commissioner Wise and counsel for claimant announced that he had no evidence to offer maintaining that the cornplaint stated a prima facie case. Thereupon, counsel for respondent moved for what amounted to either dismissal for want of prosecution or for judgment for failure of claimant's proof. After a discussion, counsel for respondent offered in evidence the Departmental Report of the Department of Public Welfare. Thereupon counsel for claimant moved for a continuance, which motion Commissioner Wise denied. Counsel for claimant then announced he was standing on the complaint and that he had no objection to the Departmental Report being received in evidence as such but that he did object to conclusions appearing therein. He further admitted that a copy of the Departmental Report had been received by him prior to the hearing. The Departmental Report was then admitted in evidence, and claimant and respondent then rested and proofs were closed.

We hold that the refusal of Commissioner Wise to grant claimant's request for a continuance after the hearing had commenced was a proper exercise of his discretion, and we hereby approve his action.

We do further hold that a verified complaint filed in this Court does not make out a prima facie case. Any claimant still has the burden of offering evidence and proving a case by **a** preponderance of the credible evidence.

Claimant herein has failed even to prove her authority to act as administrator; she has not shown who are the next of kin of decedent, nor has she even attempted to prove any allegation in the complaint that

is basic to her recovery. The Departmental Report contains no statement of any facts that can be the basis of a finding that the negligence of any agent or servant of respondent was the proximate cause of decedent's death.

For such utter and complete failure of proof an award must be and is hereby denied.

(No. 4216—Claimant awarded $589.34.)

MABEL E. BATHE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 18, 1950.

Supplemental Opinion filed May 23, 1950.

MABEL BATHE, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where claim will be allowed under.* Where claimant, an employee of the Department of Public Welfare, on her way to lunch on the institution grounds, stumbled and fell, fracturing her right wrist and left knee cap and injuring her left arm and wrist, an award will be allowed under the Act.

LANSDEN, J.

On February 16, 1949, claimant, Mabel E. Bathe, was injured in an accident that arose out of and in the course of her employment with the Department of Public Welfare at the Lincoln State School and Colony, Lincoln, Illinois.

On the date of the accident, claimant was on her way to lunch on the institution grounds, stumbled over a raised place on the sidewalk and fell, as a result of which she fractured her right wrist and left knee-cap and also injured her left arm and wrist.

After emergency treatment, claimant was taken, the next day, upon the authorization of the Assistant Superintendent of the State institution to Evangelical Deacon-

ess Hospital, Lincoln, Illinois, where she remained for two months under the care of Dr. E. C. Gaffney of that city.

Upon discharge from the hospital, claimant convalesced at her home until she was able to return to work, which she did on June 11, 1949.

During the time claimant was unable to work, she was paid compensation at a rate greater than that provided in the Workmen's Compensation Act. Such payments, in accordance with the policy of the Department of Public Welfare, were sixty per cent of her monthly wage of $175.00 per month or $105.00 per month.

No jurisdictional questions are involved. There is no claim or proof of any specific loss or permanent partial disability.

Other than emergency treatment, respondent has neither furnished nor paid for any medical or hospital services required as a result of claimant's accident, but such services as claimant received were furnished upon the authorization of respondent.

Claimant has paid or obligated herself to pay the following hospital and doctors bills, which are reasonable and were necessary and required :

Evangelical Deaconess Hospital, Lincoln, Illinois, (paid)	$576.90
St. Joseph's Hospital, Bloomington, Illinois, (blood plasma) (paid)	6.00
Dr. E. C. Gaffney, Lincoln, Illinois (unpaid)	150.00
Total	$732.90

Patricia M. Beckholt, 303 Lincoln Avenue, Lincoln, Illinois, was employed to take and transcribe the testimony before Commissioner Wise. Charges in the amount of $6.75 were incurred, which are reasonable and customary, and an award is hereby entered in favor of Patricia M. Beckholt for such amount.

On the date of the accident, claimant was 54 years of age, married but had no children under the age of sixteen years dependent upon her for support. Her earnings in the year preceding her injury amounted to $2,100.00, and her rate of compensation was, therefore, $19.50 per week.

Claimant was temporarily totally disabled for 16 2/7 weeks and was entitled to be paid for such temporary total disability the sum of $317.57. During such period she was paid the sum of $391.12, or an overpayment of $73.55.

Claimant is entitled to an award under Section 8 **(a)** of the Workmen's Compensation Act for hospital and doctors bills as set out above in the sum of $732.90 which should be reduced by the overpayment of $73.55, leaving a net award of $659.35.

An award is, therefore, entered in favor of claimant, Mabel E. Bathe, for $659.35, payable as follows:

$150.00, which is payable forthwith, to claimant for the use of Dr. **E. C.** Gaffney, Lincoln, Illinois.

509.35, the remainder of the award, which has accrued and is payable to claimant forthwith.'

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning payment of compensation awards to State employees."

SUPPLEMENTAL OPINION

LANSDEN, J.

On April 18, 1950, the original opinion was filed in this case. On May 9, 1950, respondent filed a petition for rehearing, which subsequently we granted. .

The petition for rehearing points out that we have misinterpreted the Departmental Report as to the amounts paid claimant while she was totally and tem-

porarily disabled. With this contention we agree, and the original opinion should be revised to reflect such corrections, starting with the fourth paragraph from the end thereof as follows:

"Claimant was temporarily totally disabled for 16 2/7 weeks and was entitled to be paid for such temporary total disability the sum of $317.57. During such period she was paid the sum of $461.13, or an overpayment of $143.56.

"Claimant is entitled to an award under Section 8 (a) of the Workmen's Compensation Act for hospital and doctor bills as set out above in the sum of $732.90, which should be reduced by the overpayment of $143.56, leaving a net award of $589.34.

"An award is, therefore, entered in favor of claimant, Mabel E. Bathe, payable as follows:

$350.00, which is payable forthwith,' to claimant for the use of Dr. E. C. Gaffney, Lincoln, Illinois.

$439.34, the remainder of the award, which has accrued and is payable to claimant forthwith.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning payment of compensation awards to State employees."

(No. 4218—Claimant awarded $528.00.)

COUNTY OF WILL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 9, 1950.

JOHN IRVING PEARCE, State's Attorney, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WRITS OF HABEAS CORPUS—*where county will be reimbursed for expense of Writs of Habeas Corpus filed in its jurisdiction.* Where the claimant has the Illinois State Penitentiary located within its borders,

and Writs of Habeas Corpus were filed in its courts by inmates who were not residents of the county nor were not committed by its court, an award will be made for necessary expenses of its officers incurred in such Habeas Corpus cases.

LANSDEN, J.

Claimant, the County of Will, State of Illinois, within the borders of which is located the Illinois State Penitentiary, seeks to recover from respondent the sum of $528.00. The action is brought by virtue of Ill. Rev.' Stat. 1947, Chap. 65, Sees. 37-39, to recover the necessary expenses incurred by its officers by reason of court proceedings in such county involving petitions for Writs of Habeas Corpus by or on behalf of inmates of a State charitable or penal institution who were not residents of such county at the time of their commitment and were not committed by any court therein.

Claimant has previously been granted an award of $561.50 by this Court in a similar case under the same statute, in which case claimant was awarded reimbursement for expenses incurred in Habeas Corpus cases for the period September, 1947, through June, 1948. *County of Will* v. *State,* 18 C.C.R. 189. That case and *County of Randolph* v. *State,* No. 4157, opinion filed February 14, 1950, control this case and are authorities for an award in this case.

Claimant and respondent have filed a stipulation of facts in this case. Such stipulation is hereby approved.

The stipulation discloses that claimant has complied with all of the statutory prerequisites to recovery and that, during the period from July, 1948, through March, 1949, seventy-nine petitions for Writs of Habeas Corpus were filed in the Circuit Court of Will County, Illinois, by inmates of the Illinois State Penitentiary who were not residents of the County of Will or committed by any court therein. In each case the clerk would be entitled

to a fee of $5.00, or a total of $395.00. In addition, in connection with twenty-one of such petitions, photostatic copies of certain records and documents were required to be furnished by the clerk to the Attorney General of the State of Illinois at a cost of $133.00.

No other reimbursable expenses are sought by claimant herein.

An award is, therefore, entered in favor of the County of,Will, State of Illinois, in the sum of $528.00.

(No. 4231—Claimant awarded $5.01.)

RUFUS H. BROWN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion *filed* ***April*** *18,* ***1950.***

Petition ***of*** *Claimant for Rehearing denied May 9,* ***1950.***

W. T. DENNIS, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award will be made under.* Where an employee of the Division of Highways, who felt a pain in his right hip while picking up a piece of concrete, and where a later medical examination indicated claimant had an operation about one month after the accident and an old rupture **of** the lumbo sacral disc and a complete rupture of the disc between the fourth and fifth lumbar vertebrae were found and removed, and where claimant was ordered to return to work by attending doctors, an award will be made for temporary total disability up to the date he was ordered to return to work. Claim for permanent partial disability will be denied.

SCHUMAN, **C. J.**

Claimant, Rufus H. Brown, was employed in the Division of Highways of the State of Illinois as a highway section man's helper.

No jurisdictional questions are raised. Claimant's earnings for the year preceding his claim were $2,158.06. He is married, but has no children under 16 years of age dependent upon him for support.

On October 27, 1948, Mr. Brown was one of a group of men assigned to remove broken concrete and other debris from the shoulders of SBI 1, about 3½ miles north of Norris City. At approximately 10:00 A.M., Mr. Brown started to pick up a piece of concrete. As he lifted, he felt a sharp pain in his right hip region. Although the pain persisted, Mr. Brown continued working. He consulted his family physician, Dr. J. Bryant, who on November 4, 1948, recommended an examination by a specialist in back injuries..

The Division of Highways completed arrangements for an examination of Mr. Brown on November 8, 1948 at the office of Dr. J. Albert Key, professor of clinical orthopedic surgery, Washington University, School of Medicine, St. Louis, Missouri. Dr. Key has as associates, Dr. Fred Reynolds, instructor of clinical orthopedic surgery, Washington University, School of Medicine, and Dr. Lee T. Ford, a specialist in orthopedics.

Doctors Reynolds and Ford submitted medical reports, which showed that claimant was operated on on December 7,1948; that an old rupture of the lumbo sacral disc on the right was found and removed, and at the space between the fourth and fifth lumbar vertebrae on the right a completely ruptured disc was present, which was removed.

The last medical report showed the following:

"Mr. Rufus Brown, who was operated upon on December 7, 1948 at Barnes Hospital, was seen on June 9, 1949. He had moderate limitation of back motions in all directions. The right ankle jerk is still absent, and the left is diminished. He complained of a little tenderness in the incisional scar in the lower back. Straight leg raising was limited on each side at 80°, but there was no pain. *He was advised to attempt to do more* **work.** He was dismissed from further care here, unless he should have further trouble."

The testimony of the claimant taken on November

29, 1949 shows that he has not been back to the doctors since June 9, 1949.

From a review of the record it is shown that claimant was paid $538.19 for a period of 24 2/7 weeks through May 15, 1949. On June 9, 1949 the doctors dismissed him from further care and he was advised to do more work. Extending his compensation payments through June 9, 1949, claimant would be entitled to 27 6/7 weeks or a total of $543.20. He was paid $538.19, leaving a balance of $5.01. This would fully compensate claimant for temporary total disability.

There is no showing in the record of the nature and extent of a permanent partial disability. There is no showing of a difference in earning capacity, or proof of what claimant is able to earn in some suitable employment. Any claim for permanent or permanent partial disability will have to be denied.

An award is entered in favor of claimant for $5.01, balance on total permanent, and is payable, forthwith.

The claim of Marie Springs for stenographic services in the amount of $12.29 is found reasonable and an award in the amount of $12.29 is hereby allowed.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4239—Claimant awarded $378.00.)

CARL PALMER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 9, 1950.

GARRISON AND CRANDALL, Attorneps for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NBBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION *Am—where award will be made under.* Where claimant, an employee of the Division of Highways, while chop-

ping brush on the right-of-way, severed a portion of his left great toe, and having received full payment for temporary total disability and for hospital and medical expenses, an award will be made for sixty per cent loss **of** use **of** his left great toe.

DELANEY, **J.**

On March 24, 1949, the claimant, Carl Palmer, employed by the respondent in the Department of Public Works and Buildings, Division of Highways, as a laborer, was assigned to remove brush and other vegetation from the right of way of U. S. Route 24, northwest of Rushville in Schuyler County. While chopping down a mulberry bush, the claimant misjudged the force necessary to chop off a branch. The **axe** carried through the brush and struck his left foot, severing a portion of the left great toe longitudinally.

Dr. Hugh Cooper, a specialist in diseases of the bones and joints, made the following report to the Division of Highways:

"Carl Palmer was taken to surgery and a split-thickness skin graft taken from the thigh and used to cover the denuded area on his great toe. About one-third of the great toe was removed, the line going the full length **of** the toe and going into the metatar-sophalangeal joint. He came to me with a large denuded area exposing the bones of the toe and the head **of** the first metatarsal. **I** believe it would amount to probably **60** per cent permanent loss of function of the great toe."

At the time of the accident, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of the employment.

Claimant was temporarily totally disabled as a result of the injury from March 25, 1949, to September 26, 1949, inclusive. Compensation at the rate of $18.00 a week and in the aggregate amount of $478.27 was paid by respondent to claimant, so that claimant has been

fully compensated for his temporary total disability, Medical and hospital expenses, in the amount of **$407.14,** have also been fully paid by the respondent.

Claimant, however, has sustained a sixty per cent loss of the use of his left great toe. At the time of the injury he had been employed by the respondent for a short time at a wage rate of $7.20 per day. He had no minor children dependent upon him for support. Employees engaged in a similar capacity worked less than two hundred days per year. Claimant's compensation rate, based on annual earnings of $1,440.00 is, therefore, $18.00 per week. For a sixty per cent permanent loss of use of his left great toe he is entitled to $18.00 a week for **a** period of **21** weeks, or the total sum of *$378.00.*

The record discloses that Mary L. Houser has submitted a statement of $6.80 for taking and transcribing the testimony before Commissioner Summers. This charge is fair and reasonable.

An award is, therefore, made in favor of the claimant, Carl ,Palmer, in the amount of $378.00, which has accrued and is payable forthwith.

This award is subject to the approval of the Governor as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees.''

An award is also entered in favor of Mary L. Houser in the amount of $6.80 for taking and transcribing the testimony before Commissioner Summers, payable forthwith.

(No. 4246—Claim denied.)

CHARLES L. BATLEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion pled *May* 9, ***1950.***

EDWARD J. FLYNN, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where* claim will be denied under. Where a State police officer, injured in the course of his employment, suffering an injury to the body of a vertebra on August 19, 1948, is entitled to an award for permanent partial disability under Section 8(e) of the Act, but since respondent paid all hospital and medical bills, and claimant received full pay during his. period of disability, amounting to more than all his benefits under the Act, his claim will be denied.

WORKMEN'S COMPENSATION ACT—*Where* payment **of** salary ***is*** payment **of** *compensation.* Where payment of full salary has been made with knowledge of the injury and without denial of liability, such payment is a payment of compensation.

RECOUPMENT—*may* only *be* asserted *by* counterclaim. Where a claimant under the Workmen's Compensation Act has been overpaid, the respondent may not recoup the overpayment without filing suit or counterclaim.

LANSDEN, **J.**

On August 19, 1948, claimant, Charles L. Batley, was injured in an accident which arose out of and in the course of his employment as a State Highway maintenance police officer (commonly known as a State policeman) in the Department of Public Safety, Division of Police.

On the day in question, claimant and another officer were driving west on U. S. Route 36 near the east limit of the Village of Alexander, Morgan County, Illinois. Claimant was riding in the front seat of their State police car beside the driver. They were pursuing a car thought to have been stolen. Ahead of this vehicle was a flat-bed semi-trailer truck, and ahead of the truck was a passenger car. The police car siren was sounded to

pass the semi-trailer, but at the same moment the semi-trailer pulled out to pass the passenger car ahead of it. To avoid a collision, the police car was driven onto the south highway shoulder and its left rear wheel skidded into the roadside ditch which caused the police car to be thrown out of control, overturn and then collide with a telephone pole. Both police officers were thrown clear of the police car during the overturning.

Both officers were injured and were taken to Our Saviour's Hospital, Jacksonville, Illinois. The next day it was discovered that claimant had sustained a fracture of a lumbar vertebra. Claimant was then taken to Barnes Hospital, St. Louis, Missouri, where X-rays disclosed a compression type fracture of the first and third lumbar vertebrae. Claimant also suffered multiple lacerations which completely healed.

Claimant remained at Barnes Hospital for a week when the fractures were reduced and a plaster jacket applied. He then returned to his home where he convalesced. The cast was removed in November, 1948, and he wore a Taylor brace until January, 1949. He returned to work on January **31,** 1949. All medical treatment, hospitalization and appliances were furnished and paid for by respondent.

Claimant has a slight kyphosis in the upper lumbar region and some limitation of forward bending which results in some permanent partial incapacity. However, his earnings since he returned to work have been the same or greater than before his injury. Under such state of facts, no award can be made to claimant for permanent partial incapacity under Section 8 (d) of the Workmen's Compensation Act. *Cogdill* v. *State*, 18 C.C.R. **24.** Such is apparently conceded by claimant.

However, claimant maintains that he is entitled to

a recovery under the proviso of said Section 8 (d). This proviso was first incorporated in the Workmen's Compensation Act in 1945. In 1949, the proviso was changed. Claimant's rights under the proviso are, therefore, to be determined by its wording as it stood prior to the 1949 amendment, since the accidental injury was sustained on August 19,1948.

Section 8 (d) as it applies to this case is found at Ill. Rev. Stat. 1947, Chap. 48, Sec. 145, par. (d) and reads as follows:

"(d) If, after the *accidental* injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in the cases covered by ,the specific schedule set forth in paragraph (e) of this section, receive compensation, subject to the limitations as to time and maximum amounts fixed in paragraphs (b) and (h) of this section, equal to fifty percentum of the difference between the average amount which he earned before the accident and the average amount which he is earning or is able **to** earn in some suitable employment or business after the accident. Provided, however, if no compensation is awarded under the foregoing provisions of this paragraph, and when an *accidental* injury has been sustained which results in a fracture to the body of a vertebra, resulting in a loss of function of the back, compensation may be allowed for a period not to exceed thirty **(30)** weeks in addition to compensation for temporary total disability, such compensation to be in lieu of all other compensation specified hereinbefore by this paragraph."

Upon the record in this case, we find that claimant, not being entitled to an award for permanent partial incapacity or for a specific loss under Section 8 (e), has sustained an accidental injury which resulted in a fracture to the body of a vertebra, resulting in a loss of function of his back. Claimant is, therefore, entitled to an award of compensation for 30 weeks in addition to the compensation paid him for temporary total disability, since the facts in this case make the proviso in Section 8 (d) of the Workmen's Compensation Act applicable to him.

However, claimant cannot be given a net award by this Court since the record discloses that he was so much overpaid for temporary total disability as to more than extinguish the amount he would be entitled to under the proviso of Section 8 (d).

On the date of the accident, claimant was married and had two minor children, Judith Kay, born August 29, 1943, and Mary Lee, born June 3, 1946. His wife and said children were all dependent upon him for support.

Claimant had only worked for respondent for about five months prior to his injury, but the earnings of those similarly employed amounted to $2,820.00 per year. Claimant's rate of compensation was, therefore, $20.80 per week.

From August 20, 1948, till January 31, 1949, the period claimant was totally and temporarily disabled, he was paid his full salary of $235.00 per month. For his 23 4/7 weeks period of temporary total disability he was paid $1,265.97, although he was entitled to only $490.29 at his rate of compensation. He was thus overpaid the sum of $775.68.

Under the proviso of Section 8 (d) he would be entitled to compensation for 30 weeks at $20.80 per week, or the sum of $624.00.

The net overpayment to claimant thus amounts *to* $151.68.

In an attempt to avoid this bizarre result, claimant argues that since he was paid his full salary, he was not paid compensation but was paid wages. The decisions do not support claimant in this contention, since the Supreme Court has held that payment of full salary with knowledge of the injury and without 'denial of liability is a payment of compensation. *United Air Lines* v. *Ind. Cowl*, 364 Ill. 436; *Marshall Field & Co.* v. *Ind. Corn.*, 305

Ill. 134; *Tyler* v. *Ind. Corn.,* 364 Ill. 381; *Olney Seed* Co. v. *Ind. Corn.,* **403** Ill. 587.

Were we to follow claimant's contention that no compensation was paid to him, he would be further embarrassed because this Court would have no jurisdiction of the case since it was filed more than one year after the date of the accident. But we hold that no jurisdictional questions are or can be involved in this case.

Having concluded that claimant has been overpaid $151.68, what can this Court do?

Section 8E of the Court of Claims Act provides that this Court has jurisdiction of all claims for recoupment made by respondent against any claimant. But respondent has made no such claim for recoupment. Respondent filed no answer to the complaint and by Rule 11 of the rules of this Court, respondent is held to have filed a general denial.

Rule 2 of the rules of this Court makes the Civil Practive Act, Ill. Rev. Stat. 1949, Chap. 110, applicable to actions in this Court except as otherwise provided in our rules. Under the Civil Practice Act, recoupment can only be asserted by a counterclaim. Ill. Rev. Stat. 1949, Chap. 110, Sec. 162. But the filing of a counterclaim under the Civil Practice Act is not mandatory. *Grodsky* v. *Sipe, 30* F. Supp. 656. Respondent having failed to file a counterclaim, we must, therefore, conclude that no order can be made in favor of respondent to recover the net overpayment to claimant.

Isabel Irlam, Jacksonville, Illinois, was employed to take and transcribe the testimony before Commissioner Summers. Her charges amounted to $10.00, and an award is entered in her favor for such sum.

Award to claimant denied. Recoupment to respondent denied for failure to plead same by counterclaim.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4255—Claim denied.)

HARRY C. JEWSBURY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 9, 1950.

G. R. SCHWARZ, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where claim under Act will be denied.* Where claimant, operating a road grader, fell backward off the grader on May 21, 1941, injuring his back, but continued to work for the Highway Department until June, 1948, when he was operated on for correction of the injury, and where he filed his claim for compensation on December 27, 1949, his claim will be denied for failure to file application for compensation within one (1) year.

DELANEY, J.

This complaint filed December 27, 1949, alleges that claimant, Harry C. Jewsbury, was injured by reason of an accident occurring on the 21st day of May, 1941, while claimant was engaged in operating a road grader which was being pulled by a State highway truck. The grader started suddenly, throwing claimant backward off of the grader to the ground, injuring the back of the claimant. After receiving the injury on May 21, 1941, the claimant continued to work for the State Highway Department until he was forced to resign his position in June of 1948, when he was forced to undergo surgery for the correction of the back injury.

The record consists of the complaint, motion of respondent to dismiss, notice to call up motion to dismiss, claimant's reply to respondent's motion to dismiss.

It appears from the record that claimant has failed

to comply with Section 24 of the Workmen's Compensation Act of this State, which provides that no proceedings for compensation under the Act shall be maintained unless claim for compensation has been made within six months after the accident, and unless application for compensation is filed within one year after the date of the injury, where no compensation has been paid, or within one year after the date of the last payment of compensation, where any has been paid. Failure to file complaint within the one year period under Section 24 bars the right to file such application thereafter. The motion of the Attorney General to dismiss is hereby allowed.

Complaint dismissed.

(No. 4266—Claimant awarded $77.77.)

SOCONY VACUUM OIL COMPANY, INCORPORATED, Claimant, *vs.* STATE OF ILLINOIS, Xespondent.

Opinzon filed May 9, 1950.

W. W. SLEATER, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

MATERIALS AND SUPPLIES—*when claim will be allowed for payment after appropriataon has lapsed.* Where claimant, manufacturer and seller of gasoline, oil and grease, produced sales tickets for products which it has furnished departments of the State of Illinois, but presented them for payment after the appropriation from which these invoices were payable had lapsed, although a sufficient balance remained in the appropriation at the time it lapsed, the claim will be allowed where it was made within a reasonable time.

DELANEY, J.

The claimant, Socony Vacuum Oil Company, Incorporated, is engaged in the manufacture and sale of petroleum and petroleum products. During the years 1948 and 1949, claimant supplied gasoline, oil and grease to the various departments of the respondent.

From the report of the Division of Highways, which forms a part of the record, it appears that the claimant furnished gasoline, oil and grease to the various departments of the State of Illinois. The departmental report also shows that the sales tickets of claimant were not presented for payment by claimant before the appropriations and funds from which these invoices were payable had lapsed, but that sufficient unexpended balance remained had claim been filed in reasonable time.

Claimant furnished properly and duly authorized materials to the respondent, for which it has not received payment. This Court has repeatedly held that where materials or supplies have been properly furnished to the State, and a bill therefor has been submitted within a reasonable time, but the same was not approved and vouchered for payment before the lapse of the appropriation from which it is payable, an award for the reasonable value of the supplies will be made, where, at the time the expenses were incurred, there were sufficient funds remaining unexpended in the appropriation to pay for the same.

Carl S. Johnson v. *State,* 16 C.C.R. 96; *Rock Island Sand and Gravel Co.* v. *State, 8* C.C.R. 165; *Oak Park Hospital* v. *State,* 11 C.C.R. 219; *Yourtee-Roberts Sand Co.* v. *State,* 14 C.C.R. 124.

The departmental report shows that the two purchases for oil and gasoline in the amount of **$4.33,** made by the employees of the Secretary of State, were paid by the employees at the time the materials were received, and the amount as set forth in claimant's complaint will be reduced accordingly.

An award is, therefore, entered in favor of claimant for the sum of $77.77.

(No. 4112—Claim denied.)

EMMA STEPHENS, ADMINISTRATOR OF THE ESTATE OF ROBERT EUGENE STEPHENS, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 18, 1950.

Petition of Claimant for Rehearing denied June 6, 1950.

SCHMIEDESKAMP & DEEGE AND BARBER & BARBER, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

CONTRIBUTORY NEGLIGENCE—*failure to prove freedom from contributory negligence will cause denial of claim.* Where claimant's intestate left a car parked at the highway at night and after walking to a culvert, fell into a hole 15 feet deep, and where his companion at the time of the incident did not testify, the claim will be denied for failure to prove freedom from contributory negligence.

DUE CARE—*where care cannot be presumed.* Due care on the part of a deceased, at the time of the accident to which there were no eyewitnesses, cannot be presumed from the mere fact of the happening of the accident and the consideration of the human instinct of self preservation.

LANSDEN, J.

Claimant, Emma Stephens, as Administrator of the Estate of Robert Eugene Stephens, deceased, seeks to recover from respondent under the Wrongful Death Act, Ill. Rev. Stat. 1947, Chap. 70, for the alleged negligence of respondent in failing to barricade a culvert and drain or place warning signs nearby as a result of which claimant's intestate fell into the hole sustaining injuries from which lie died.

On August 22, 1947, shortly after midnight, claimant's intestate and his cousin, Harold Stephens, were returning from an Old Settlers carnival at Clayton, Illinois, driving along U. S. Highway 24. The evidence also tends to show that they were accompanied by another person, one Robert Devergier, but the record is not clear

on this point. Nevertheless, about seven-tenths of a mile west of Clayton, the car stopped and the two Stephens boys got out. Claimant contends that the purpose of the stop was for the boys to take care of the call of nature.

The car was stopped on the north shoulder off of the paved portion of the highway about 40 feet east of the culvert which extended under the highway. Shortly thereafter Harold Stephens was found unconscious and bleeding lying on the rock strewn bed of the drain, and claimant's intestate was found staggering around in the vicinity of the culvert with a severe head injury and other lacerations.

Both boys had travelled at an angle from their car across 18 feet of paved highway, 6 feet of shoulder and 8 feet of sloping bank to the edge of the culvert and drain which was 40 feet forward of their automobile, or a distance of not less than 50 feet. The depth of the hole into which both fell was about 15 feet, the sides of which were almost perpendicular.

Neither Harold Stephens nor Robert Devergier testified. The record indicates both were in the navy in the Pacific at the time of the hearing before Commissioner Jenkins.

The last persons who saw the Stephens boys prior to the accident were at a tavern one mile from the scene when the boys were requested to leave because of boisterous conduct. The record shows no intoxication of either Stephens boy.

The record is devoid of any evidence as to the circumstances of the accident.

Claimant maintains that the failure of Harold Stephens and Robert Devergier to testify cannot result in an adverse presumption against her. This Court will assume claimant is correct, but will not decide the point.

Claimant then maintains that proof of careful habits of claimant's intestate is admissible because the only eyewitnesses were unavailable to her for purpose of testifying. Even if we also assume that, under the circumstances, evidence of careful habits would be admissible, the record is lacking in any evidence of such habits.

An award must, therefore, be denied for failure of claimant to introduce any evidence of the freedom from contributory negligence of claimant's intestate, either by direct testimony of eyewitnesses or by inferences through evidence of the careful habits of claimant's intestate. *I.C.R.R.* Co. v. *Oswald, 338* Ill. *270.*

Due care on the part of the deceased at the time of the accident to which there were no eyewitnesses cannot be presumed from the mere fact of the happening of the accident and a consideration of the human instinct of self-preservation. *Newell* v. *C.C.C. & St. L.* Ry. Co., 261 Ill. 505.

We have in this opinion discussed only the crucial facts and law which we deem to be controlling. Our failure to discuss other facts and propositions of law does not mean that we have not carefully considered them. However, on the state of the record as a whole, we conclude that, other than the question of contributory negligence hereinbefore discussed, an award would be based only on conjecture and speculation. An award cannot be predicated on such a shaky and unstable base. *MacLeod* v. *State,* 17 C.C.R. 167; *Sprague* v. *State,* 14 C.C.R. 116.

Award denied.

(*No.* 4121—Claimant awarded $2,500.00.)

LOUISE COURTNEY, A MINOR, BY CLEM COURTNEY, HER FATHER AND NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 6, 1950.

JAMES O. MONROE AND JOSEPH R. BARTYLAK, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—*where leaving stubs protruding from cement stairway from which railing had been removed amounts to.* Where a minor 9 years of age sought to avoid vehicular traffic over a narrow bridge used a cement stairway providing access to the highway on which a railing had existed but was removed leaving stubs of pipe protruding and the child stumbled over one of such stubs, fell the complete length of the stairs and was seriously injured, an award was made for such injuries.

CONTRIBUTORY NEGLIGENCE—*where a minor of 9 years of age cannot be guilty* of. Where a minor of 9 years of age is injured, it was held that a child between seven and fourteen years of age can only be held to a standard of care commensurate with children of like age, experience and understanding.

SIDEWALKS—DEFECTS—*persons are not required to keep their eyes fixed on pavement for.* A person using sidewalk may assume that it is in a reasonably safe condition and need not keep his eyes fixed on pavement to search out defects and dangers.

LANSDEN, J.

Claimant, Louise Courtney, a minor, by Clem Courtney, her father and next friend, seeks to recover the sum of $2,500.00 for injuries sustained by her allegedly as the result of the negligence of respondent.

Previously an opinion was filed in this case, one justice dissenting, denying an award. On petition of claimant we granted a rehearing, and we have now reached the conclusion that our original opinion was in error and that claimant is entitled to an award in the sum of $2,500.00.

On October 5, 1946, in the forenoon, claimant, then

nine years of age, and a playmate, Gloria Jeanne Lutz, while going to claimant's home from a nearby grocery store, were walking along Highway No. 157, near Caseyville, Illinois. The two children proceeded in a northerly direction along the right side of the highway and started across a viaduct on the highway over the tracks of the Pennsylvania Railroad. For some distance from each end and for the entire length of the viaduct the paved portion of the highway was forty feet wide. The normal eighteen foot width of the highway connected directly with the forty foot portion.

At the southeasterly corner of the span of the viaduct, a concrete stairway led down to the level of the railroad tracks through a four foot opening on the easterly side of the highway between the end of the concrete abutment of the viaduct and the timber fence bordering the highway. The stairway ran in a northeasterly direction away from the viaduct and at the top of the stairway there was a sloping concrete platform approximately flush with the four inch curb. This platform was less than two feet wide at its north end and approximately three feet, six inches wide at the south end. This irregular shape was due to the angling of the stairway away from the viaduct at other than right angle. The stairway contained thirty-nine steps.

A metal pipe handrail ran the full length of the northerly side of stairway starting from a perpendicular pipe set in concrete at the northeast corner of the platform. There had once been a similar handrail along the southerly side of the stairway, but it had been broken off or stolen some time prior to October 5, 1946. The only portion of the southerly handrail fixtures that remained were four "stobs" or projections of pipe set in concrete about two inches high and two inches in diam-

eter, one of which was located in the southeast corner of the stairway platform, six inches from the easterly edge and three inches from the southerly edge. These "stobs" were threaded so that pieces of pipe could be screwed into them as uprights for the handrail and the handrail when in place would rest on the top of the uprights.

The highway, viaduct, stairway and approaches were all under the control of respondent through the Department of Public Works and Buildings, Division of Highways. Respondent knew for some time prior to October 5,1946, that the handrail was missing and that the "stob" on the stairway platform stuck up at the southeast corner thereof.

As claimant and her friend approached the gap at the stairway platform, a car coming from behind caused both of them to step onto the platform to be certain they were out of the way, since there was no sidewalk on the viaduct or leading thereto. The Lutz child stepped on the narrow northerly portion of the concrete platform by the handrail and claimant stepped on the broader southerly portion and in so doing her foot struck the "stob" imbedded in concrete and she tripped and fell the full length of the thirty-nine steps, sustaining severe injuries, including a fractured skull, concussion of brain, compression of skull and eye injuries.

Claimant was immediately taken to St. Mary's Hospital in East St. Louis, Illinois, where she remained in a coma for two weeks, and was hospitalized for six weeks. Her medical and hospital bills amounted to approximately $500.00.

At the time of the hearing, claimant had a disfiguring scar on her head. Her forehead was somewhat deformed, and her head still contained a depression. She

had missed one entire school term due to her injuries and long convalescence.

The above facts are not seriously disputed, but the inferences to be drawn from them are. Respondent's chief ground of argument is that claimant has not proven freedom from contributory negligence. and, therefore, an award must be denied for failure to prove this *sine qua non* of Illinois law. Since this Court must function as both judge and jury, we hold that both as a matter of law and of fact, claimant was not guilty of contributory negligence.

Claimant was nine years of age at the time of the accident. A child between the age of seven and fourteen years is only held to a standard of care commensurate with that of children of like age, experience and understanding. *Hughes* v. *Medendorp,* **294** Ill. App. **424;** *Moser* v. *E. St. L. & Int. Water Co.,* **326** Ill. App. **542;** *Levin* v. *Lauterbach Coal & Ice Co.,* **329** Ill. App. 180.

The concrete platform was to all intents and purposes a sidewalk. That was what it was intended to be used for. For claimant it served not only such purpose but as an island of safety from a danger which reasonably she apprehended due to the approach of a car behind her. She had a right to use the platform for either purpose. Courts in this State have held that children may use sidewalks for purposes of play and recreation in addition to normal usages. *Waverly* v. *Reeser,* **93** Ill. App. **649;** *City of Chicago* v. *Cohen,* **139** Ill. App. **244.**

The negligence of others need not be anticipated either by adults or children. *Koepke* v. *Chicago, R. I. & P. Ry. Co.,* **200** Ill. App. **247;** *Kittier* v. *Chi. & W. Ind. R.* Co., *203* Ill. App. **439.**

A person using a sidewalk may ordinarily assume it is in reasonably safe condition and need not keep his eyes

fixed on the pavement to search out defects and dangers. *Graham* v. *City of Chicago,* 346 Ill. 638.

In *City of McLeansboro* v. *Trammel,* 109 Ill. App. 524,526, the Court said:

"A failure to look at one's pathway does not necessarily preclude recovery."

And in *City of Chicago* v. *Babcock,* 143 Ill. 358, 363, the Court said:

"A person passing along a sidewalk . . . is required to use ordinary and reasonable care and diligence to avoid danger, but what is ordinary and reasonable care depends upon the circumstances of each particular case . . . A pedestrian upon such sidewalk may ordinarily assume that the sidewalk is in a reasonably safe condition for travel. To hold that such person is absolutely bound to keep his or her eyes constantly fixed on the sidewalk in a search for possible holes or other defects, would be *to* establish a manifestly unreasonable and wholly impracticable rule. . . ."

On the authority of the above cited cases, claimant was not guilty of contributory negligence and respondent was guilty of negligence in not warning of the danger inherent in the "stob" and the missing handrail. With knowledge of such defects, respondent is liable. *Pomprowitz* v. *State,* 16 C.C.R. 230; *Jessup* v. *State,* 16 C.C.R. 227; *Toler* v. *State,* 16 C.C.R. 315; *Rickleman* v. *State,* No. 4195, opinion filed October 20, 1949; *City of Taylorville* v. *Stafford,* 196 111. 288.

The last cited case is somewhat similar on the facts to this case in that plaintiff therein tripped over a "stob" in a sidewalk. The Court therein assumed that plaintiff could recover on the facts proven and discussed only the proof required to show knowledge on the part of defendant of the existence of the dangerous and defective condition of the sidewalk.

From the foregoing we hold that claimant has proven her case by a preponderance of the credible evidence. To deny recovery in this case would be to disregard all

facts and reasonable inferences therefrom and to run counter to the purport of the above cited cases. Respondent has called to our attention no authorities which are contrary to those we have cited.

However, respondent does contend that, since claimant was walking on the right and not the left side of the highway prior to the accident, she was in violation of Chapter 95½, Section 175 of the Uniform Act Regulating Traffic on Highways and should be barred from recovery. Although the applicability of said statute to claimant is doubtful, since she was on the concrete platform at the time of the accident and since she was not struck **by** a vehicle, the courts in this State have, under facts similar to those in this case, held that claimant would not be contributorily negligent as a matter of law. *Blumb* v. *Getx*, 366 Ill. 273; *Alden* v. *Coultrip,* 275 Ill. App. 306; *Rowley* v. *Rust*, 304 Ill. App. 364.

As to the issue of damages we feel that claimant in any court would be entitled to more than $2,500.00, because of the seriousness and permanency of her injuries, but Section 8 C of the Court of Claims Act, Ill. Rev. Stat. 1949, Chapter 37, Section 439.8, limits our award to such amount in cases sounding in tort. That such recovery is limited should not make the citizens of this State lose sight of the fact that some recovery is now permitted in types of cases where prior to the 1945 Court of Claims Act awards were uniformly denied.

An award is, therefore, entered in favor of Louise Courtney, a minor, by Clem Courtney, her father and next friend, in the amount of $2,500.00.

(No. 4177—Claimant awarded $611.66.)

MELVIN W. NEWMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinzon filed June 6, 1950.

WILLIAM L. CARLIN, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM J. COLOHAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION *Am—where award will be made under.* Where a construction laborer employed by the Division of Highways, received injuries in the course of his employment and the evidence showed that he sustained 20% total disability to his left leg, an award therefor will be made under the Act.

SCHUMAN, C. J.

Claimant sustained an injury to his left knee on March 1, 1948 while employed by the Division of Highways, under the classification laborer-construction.

There are no jurisdictional questions involved. All temporary total disability payments have been made. Claimant also seeks to recover for an injury to his left elbow. It is undisputed that this injury did not occur in the course of his employment. Therefore no recovery can be allowed for this injury. Claimant's earnings in the year preceding his injury were $2,480.00.

Dr. H. B. Thomas, professor emeritus of orthopedics, Illinois University, College of Medicine, examined and treated claimant. In his opinion claimant has sustained 20% total disability to left leg. This is the only medical evidence offered.

From the evidence, claimant is entitled to an award of 20% total disability of the left leg.

Rothbart and Sewell have submitted a statement for $35.80 for stenographic services. The claim is reasonable and is allowed.

William J. Cleary & Co. have submitted a statement

for stenographic services. The claim is reasonable and is allowed.

Claimant was overpaid for non-productive time in the amount of **$129.34.** This amount will be deducted from the award.

On the basis of this record, we make the following award:

20% permanent partial specific loss **of** the use of the left leg in the amount of $741.00, less the, sum **of** $129.34 paid for non-productive time, malting an award of $611.66, all of which has accrued and is payable forthwith.

An award is also entered in favor of Rothbart & Sewell for stenographic services in the amount of $35.80, which is payable forthwith.

An award is also entered in favor of William **J.** Cleary & Co. for stenographic services in the amount **of** $21.10, which is payable forthwith.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees''.

(No. 4200—Claimant awarded $1,000.00.)

DR. ETHEL **A.** CHAPMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 6, ***1.950.***

HELEN L. GLENNON, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S OCCUPATIONAL DISEASES ACT—*where* an award *will be made under.* Where a female physician employed to make physical and mental examinations at the Elgin State Hospital and is required to visit the tuberculosis ward, and work extra hours in violation **of** "An Act concerning the hours of employment of females in certain occupations" (Ill. Rev. Statutes 1949, Chapter 48, Sec. 5), and contracts tuberculosis, it was held that violation of the said Statute constituted

negligence and that recovery could be had under Sec. 3 of the Workmen's Occupational Diseases Act, and the fact that she was paid wages would not bar recovery but would be considered in assessing damages.

SCHUMAN, C. J.

Claimant worked from January 1, 1937, to April 1, 1947, at the Elgin State Hospital and from April 1, 1947, to August 18, 1948, at the Chicago Community Clinic as a physician. At the Elgin hospital her duties were to make physical and mental examinations of patients. That she was also relief physician on the Tuberculosis Service and in that capacity she visited the tuberculosis ward about once a week.

The regular work week at the Elgin hospital was 48 hours. During war years and after, from 1942 to 1947, there was a shortage of physicians. Claimant worked extra in the evenings as much as eight or nine hours a week. In addition claimant was on O. D. duty every seven or eight days, which meant she was on call from five o'clock in the evening to eight o'clock the next morning.

Claimant left the Chicago Community Clinic because of a diagnosis that she had minimal active pulmonary tuberculosis on August 18, 1948. She was at the Edwards Sanitarium, Naperville, Illinois, for 90 days, and from November, 1948, until September 1, 1949, she remained at home.

There is no question from the evidence that claimant was exposed to tubercular patients in the performance of her duties.

Dr. Jerome R. Head testified he saw claimant on August 11, 1948, and diagnosed her ailment as minimal pulmonary tuberculosis; and that there might be a causal relation between the illness of claimant and her employment.

Dr. Hoffron testified for the State and stated he was

Assistant Superintendent of Elgin hospital. That he knew claimant. That the rules prescribed that personnel were to don gowns and masks. That during 1942-1946 there was a shortage of physicians and because of this it was necessary to work three to ten hours a week overtime, at night.

Dr. Rurock, the Acting Superintendent at the Chicago Community Clinic, testified that clinic did not treat active tubercular patients. That in August, 1948, claimant had a test X-ray which indicated tuberculosis and that she had to leave the service due to illness.

Dr. Teller testified as to his duties at the Elgin hospital and the Chicago Clinic and that rules required physicians to wash after leaving T. B. ward, and wear gowns and masks while in the ward.

The claim, as filed in this Court, predicated respondent's negligence in failing to maintain proper facilities and adequate staff as the proximate cause of claimant's illness.

The brief of claimant predicates the .basis of the claim that respondent violated "An Act concerning the hours of employment of females in certain occupations" (Ill. Rev. Statutes, 1949, Chap. 48, Sec. 5) which reads in part, "No female shall be employed . . . in any public . . . institutions or offices thereof, incorporated or unincorporated in this State, more than eight hours during any one day nor more than forty-eight hours in any one week."

The evidence shows claimant earned in the year immediately before her illness $5,820.00. Claimant was paid $1,943.65 for the period October 7, 1948, to April 7, 1949, and a total of $2,053.17 for unproductive time.

It has been previously held in *Norman* v. *State*, 16 C.C.R. 128 at 131-132, as follows :

"The State not having elected to provide and pay compensation under Section 4 of the Workmen's Occupational Diseases Act, the employee has a right of action, under Section 3 of the Act. That section provides that violation by an employer of any Statute of this State, intended for the protection of the employees, shall constitute negligence of the employer within the meaning of this section."

The evidence shows that claimant was required to work a great deal of overtime in her work and more than eight hours a day, and more than 48 hours a week, and frequently came in contact with tubercular patients. Under the holding of the case of *Norman* v. *State*, supra, this was a violation of "An Act concerning the hours of employment of females in certain occupations" (Ill. Rev. Statutes, Chapter 48, Section 5). Claimant did not come within any of the exceptions in said statute and accordingly is under the terms and provisions of said statute.

As previously held in the *Norman* v. *State*, supra, the violation of this statute constitutes negligence under Section 3 of the Workmen's Occupational Diseases Act.

It is apparent claimant has misconceived her remedy. There is a claim made for compensation under the Act. Her remedy under Section 3 is for damages due to the negligence of the State. The Court will so construe her claim as one for damages for the reason the case was tried on that theory.

Claimant, it was admitted, earned $5,820.00 the year before her illness. The fact she was paid wages and compensation would not bar a recovery for damages, although the Court will consider the same in assessing damages.

The Court concludes that the claimant should be awarded $1,000.00 as damages for the illness she received.

A statement for stenographic services was submitted by William J. Cleary Co. in the amount of $94.13, which is found to be reasonable.

An award in the amount of $94.13 is allowed to William J. Cleary Co.

An award is therefore entered in favor of claimant in the sum of $1,000.00.

An award is entered in favor of William J. Cleary Co. for stenographic services in the amount of **$94.13.**

(No. 4207—Claim denied.)

HELEN STANOVICH, WIDOW, ET AL., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 6, 1950.

JOSEPH R. BARTYLAK, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

MENTAL INSTITUTIONS—*death of inmates therein. What must be shown to prove death occasioned by wrongful act.* Where suit is brought by widow of inmate in a mental hospital claiming that death was due to other patients aiding in the handling and treating of the deceased, but offered no proof in respect thereto, the court held the claimant must allege and prove a wrongful act, neglect or default, and the claim was denied.

DELANEY, J.

The claimant, Helen Stanovich, widow, and personal representative of Daniel Stanovich, deceased, filed her complaint on June 24, 1949, alleging that Daniel Stanovich received severe and critical injuries in the course of treatment at Alton State Hospital, and that he died as a direct and proximate result of said injuries.

She alleges that Mr. Stanovich, entered the institution on June 23, 1948, and the hospital records show he was admitted as an emergency patient under provisions of the Revised Mental Health Act. Claimant further alleges that certain mental patients confined to the institution aided the hospital attendants in handling and

treating the deceased, and that Daniel Stanovich received injuries while being treated that caused his death on June 25, 1948. In Paragraph 3 (i), the claimant alleges that this claim is brought under the provisions of the Court of Claims Act which gives the Court limited jurisdiction of tort claims, and the provisions of the wrongful death statute. In Paragraph 6 of the complaint, claimant alleges that her claim sounds in tort..

The record in this case consists of the complaint, brief and arguments of both the claimant and respondent.

The claimant contends that the respondent was negligent when the better mental patients were permitted to aid the attendants in their care of the disturbed patients, and that Daniel Stanovich received injuries causing his death due to acts of these mental patients.

The testimony showed that Daniel Stanovich entered the Alton State Hospital for treatment; after one initial examination, the patient was given a bath and placed in the diagnostic ward. The deceased became resistant and combative, and he was placed in the disturbed ward and administered a drug to quiet him. During the time the deceased remained in the disturbed ward he received a slight laceration of the lower lip and a subcutaneous hemorrhage of the left eye. Later the deceased had to be placed in a pack, which is a wet sheet that is a treatment to quiet down disturbed patients. Two days later, on June 25, 1948, Daniel Stanovich was found dead in bed. The last time he was seen alive lie was sleeping normally. It is the claimant's contention that the death of Daniel Stanovich was caused from exhaustion due to the negligent care furnished by respondent.

Dr. Michael Nakutny and Dr. C. Siegfried Gruenwald, staff physicians, and Dr. Abraham Simon, Superintendent, of the Alton State Hospital, testified as to

their knowledge of deceased's general physical and mental condition and also in regard to their findings at the autopsy. It was found at the autopsy that deceased was suffering from syphilitic meningoencophalitis, and the infection was active at the time. The testimony of claimant consists of observations of Mr. Stanovich but gave no conclusion as to the cause of death.

The claimant predicates her action on the provisions of "An Act requiring compensation for causing death by wrongful act, neglect or default." Section 1 of the said Act (Chap. 70, Sec. 1, Ill. Rev. Stats., 1949) provides:

"Be it enacted by the People of the State of Illinois, represented in the General Assembly: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Under the provisions of the said Act, it is clear that a claimant must allege and prove a wrongful act, neglect or default which caused the death. The Supreme Court of Illinois in the case of *Holton* v. *Daly*, 106 Ill. 131, said at page 138:

"And it has accordingly since been held the declaration must aver, and the proof must establish, a wrongful act, neglect or default of defendant, causing the death of the intestate under such circumstances as would entitle him to maintain an action if death had not ensued, and the fact of survivorship, and the name or names of widow or next of kin."

In the more recent case of *Mooney* v. *City* of *Chicago*, 239 Ill. 414, the Court said at page 421:

"It was necessary, in addition to the facts stated in the instruction, for the jury to find that the injury was the cause of Dillon's death. He was not killed at the time of the accident, so that it cannot be said there was no other conclusion at which the jury could have arrived on that question, and the omission, therefore, was material. The sub-

stance of the right of action conferred by the statute is, that the death of a person shall be caused by the wrongful act, neglect **or** default **of** another."

Of similar effect are the holdings in *Wilcox* v. *Int. Harvester Co.,* 278 Ill. 465, and *Biddy* v. *Blue* **Bird Air** *Service,* 374 Ill. 506.

From these authorities, it is clear that the claimant, having alleged an action for wrongful death, must prove the cause of death.

We are of the opinion that there was no wrongful death in this cause, and an award is denied.

(No. 4217—Claimant awarded $1,013.00.)

SAMUEL R. PRATHER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June ***6, 1950.***

JOHN P. MEYER, Attorney for Claimant.

IVAN **A.** ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award* ***will*** ***be*** *made under.* Where an employee of the Division of Highways, while engaged in changing a blade on a snow-plow struck his knee against blade and sustained **30** per cent loss of the **use** of his right leg in consequence thereof, he was entitled to an award therefor under the Act.

SCHUMAN, C. **J.**

Samuel R. Prather, claimant, was an employee of the Department of Public Works and Buildings, Division of Highways, and was employed as a highway section man from March 24, 1941, to date of his injury on **January** 31,1949. On that date he was sixty-seven (67) years of age, married and had no children under sixteen (16) years of age dependent upon him for support. During the year preceding the injury he was paid a salary of $2,436.00 at the rate of $203.00 per month.

On January 31, 1949, in the forenoon he was engaged in plowing snow and in the afternoon he went to the Highway Garage in Danville to change a blade on the plow; that he was assisted in this work by a fellow employee and while moving from one side of the snowplow to the other he struck his right knee against the blade; that the knee started hurting immediately and he went home and on the next day was attended by Dr. Dickerson. Later, at the request of the Highway Department, he was sent to Chicago, where he was treated by Dr. H. B. Thomas on several occasions. Also on these trips to Chicago he was given diathermy treatments and on one occasion suffered a burn. He was later attended by Dr. S. C. Crispin of Dandle, Illinois. He was discharged by Dr. Thomas on April 19, 1949. During his disability he was paid full salary through February 28, 1949, and compensation at the rate of $19.50 per week from March 1, 1949, to April 19, 1919, inclusive, making a total payment of $342.28. Sometime during his period of disability Mr. Prather was discharged by the Division of Highways and did not return to work.

The evidence and departmental report disclose that claimant was injured in an accident arising out of and in the course of his employment; that proper notice and claim were made and that the complaint was filed within the time required by statute.

Claimant has asked for an additional amount of medical care and attendance to correct the injury, for sixty-four weeks temporary total disability and for one hundred ninety weeks loss of use of leg.

There is no showing that Mr. Prather is entitled to any additional temporary total disability since he was paid to date of April 19, 1949. There is proof that he was not completely reimbursed by the State for his

expenses and he should be allowed an additional amount of $5.00 for meals while on his trip to Chicago, $15.00 for taxi fare and $6.50 for X-rays at Lake View Hospital, making an additional amount of $26.50.

There is also evidence that claimant had a permanent partial disability of the right leg at the time of the hearing due to the accident in question. Dr. Thomas, in his final report on April 19, 1949, stated that claimant was discharged as of April 19, 1949, with no disability. Several X-rays were taken by Dr. Thomas but they were not produced at the hearing and the record shows that claimant, through his attorney, Mr. Meyer, made an attempt to secure these X-rays from Dr. Thomas and Mr. Guy but same were never received. Dr. Paul Kaminski of Danville, Illinois, a specialist in bone and joint surgery, testified that he saw Mr. Prather on May 28, 1949, and on November 14, 1949. He testified'that Mr. Prather suffered from a torn cartilege in the right knee which was followed by scar formation; that there was a moderate degree of atrophy of the quadricep muscles which control the straightening of the leg at the knee; that there was a mild swelling of the knee and that the claimant complained of a tenderness and pain over the inter aspect of the front side of the right knee; that claimant lacked about 5 degrees of complete extension and was able to flex to 90 degrees, whereas normal was 135 degrees; that the knee was susceptible of locking and giving away, although he had never seen the claimant when that happened, and that he recommended an operation. Dr. Kaminski also testified that he had seen the claimant when he had suffered from the diathermy burns. The evidence of claimant, his wife, fellow employees and employer was that he had only worked for a period of several weeks since the accident and that

he was unable to do work that involved the use of the leg.

There is no dispute that claimant sustained an injury to his right knee resulting in some loss of use of the right leg. There is a conflict in the medical testimony, but a reasonable deduction therefrom indicates some loss of use. The Commissioner saw claimant and examined his leg. It is the opinion of the Court that claimant has suffered a 30% loss of use of the right leg.

Claimant was overpaid for non-productive time the sum of $125.00, which will be deducted from the award.

Claimant was entitled to the sum of $26.50 for expenses incurred in treatment by the State doctor.

Claim is made by Juanita O. Craig for stenographic services in the amount of $78.00. This amount is found reasonable and is allowed.

On the basis of this record, we made the following award:

30% permanent partial specific loss of the use of the right leg in the amount of 57 weeks at $19.50 per week or a total of $1,111.50. From this sum is deducted the sum of $125.00, being overpayment for non-productive time, making the award $986.50. All of which has accrued and is payable forthwith.

An award is also entered in favor of claimant in the amount of $26.50 for expenses, making a total award of $1,013.00, all of which has accrued and is payable forthwith.

An award is entered in favor of Juanita O. Craig for stenographic services in the amount of $78.00.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4222—Claimant awarded $709.79.)

CECIL J. CAVANAUGH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 6, 1950.

SCOTT W. CLEAVE, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award will be made under.* Where an employee of the Division of Highways while cranking a caterpillar tractor motor, the motor backfired causing the crank to spin backward and the claimant's left radius was fractured one half inch above the wrist joint resulting in 20 per cent loss of the use of the left hand, an award therefor will be made under the Act.

DELANEY, J.

This complaint was filed August 10,1949. The record consists of the complaint, transcript of the testimony, and Departmental Report. No jurisdictional question is raised.

The claimant, Cecil J. Cavanaugh, 46 years of age, on October 11, 1948, was employed by respondent in the Department of Public Works and Buildings, Division of Highways, as an equipment operator. At approximately 1:30 that afternoon, about three miles southeast of Urbana, Mr. Cavanaugh was asked to start a Caterpillar tractor motor. As he cranked the tractor motor, it backfired, causing the crank to spin backward. The sudden backward motion of the motor crank fractured Mr. Cavanaugh's left radius one-half inch above the wrist joint. A Division supervisor took Mr. Cavanaugh to Dr. L. M. T. Stilwell of Champaign, Illinois, for treatment. Dr. Stilwell reported, "Complete transverse fracture of the radius, treatment reduction of fracture, application of cast and sling." It is our opinion that claimant be allowed twenty (20) per cent loss of use of left hand.

Claimant was paid full salary from October 12, 1948, to October 31, 1948, and compensation at the rate of $19.50 per week from November 1, 1948, to January 31, 1949, making a total payment of $362.74. Claimant returned to work for about four days the first of February and then was discharged by the State of Illinois.

The Departmental Report and the evidence disclose that claimant was paid compensation to January 31,1949, but the evidence further discloses that he was not able to resume his former occupation at that time, and that no other job was provided. We are of the opinion that he be allowed'five weeks' additional temporary total disability at the compensation rate of $19.50 per week, or a sum of $97.50. Claimant was overpaid for non-productive time for the period of October 12, 1948, to October 31,1948, in the amount of $50.71.

An award is, therefore, entered in favor of claimant, Cecil J. Cavanaugh, for a twenty (20) per cent loss of use of left hand as a result of the accident. For such permanent loss of use of left hand, under Section 8, Paragraph (e) 12, the claimant should receive from the respondent the compensation rate of $19.50 per week for 34 weeks, or the sum of $663.00, and an award is also entered in the sum of $97.50 for five weeks' additional temporary total disability, or a total award of $760.50, deducting the amount of $50.71 from the award, thereby making a net award in the amount of $709.79, all of which has accrued and is payable forthwith.

Respondent has paid the following creditors in connection with Mr. Cavanaugh's injury: Dr. L. M. T. Stilwell, $125.00; Mercy Hospital, $14.60; and Burnham City Hospital, $43.50; or a total of $183.10.

Louis W. Temple, Court Reporter, has rendered a

statement for $77.50 for the taking and transcribing of the evidence. This charge is fair and reasonable.

An award is, therefore, entered in favor of Louis W. Temple for taking and transcribing the testimony in this case in the amount of $77.50.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4228—Claimant awarded $962.58.)

BELLE DAVIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 6, 1950.

ALBERT N. KENNEDY, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award will be made under.* Where an attendant at the Dixon State Hospital was attacked by a patient and pushed against a door with such force so as to injure her left arm at the distal end of the humerus and knocked down and sustained severe contusions, and after treatment was later discharged because of her physical condition not related to the accident, it was recommended that an award for 25% of the loss of use of the left arm, upon which recommendations award was made under the Act.

LANSDEN, J.

Claimant; Belle Davis, seeks to recover under the Workmen's Compensation Act as a result of an injury that arose out of and in the course of her employment as an attendant at the Dixon State Hospital, Dixon, Illinois, operated by the Department of Public Welfare.

Claimant went to work at 11 P.M. on December 31, 1948, and at approximately 1:15 A.M. on January 1, 1949, she was attacked by a patient, who pushed her with such force against a door that her left elbow was fractured at the distal end of the humerus. Claimant also was knocked

down and sustained some rather severe contusions, all of which cleared up satisfactorily.

Claimant was hospitalized at the institution's hospital until March 3, 1949. Her arm was placed in a cast after X-rays disclosed the fracture of the humerus and irregularities in the proximal ends of both the radius and the ulna. During her period of hospitalization, she was kept in bed and after the removal of the cast massage was used to get the muscles of her arm loosened up. Claimant was determined to be able to return to work on April 1, 1949.

However, claimant did not return to work until May, 1949, and in June, 1949, she took a leave of absence, and she has not worked since because she was let out on account of her physical condition not related to the accident.

No jurisdictional questions are involved, and the only question for determination is the degree of loss of use of claimant's left arm. True it is that some evidence was introduced as to claimant's permanent partial disability, but this evidence is not convincing either as to causal connection with the accident on January 1, 1949, or the extent, and failure to prove reduction in earning capacity is fatal to any recovery on this ground. *Cogdill* v. *State*, 18 C.C.R. 24; *Merritt* v. *Ind. Com.*, 322 Ill. 160; *Rohles* v. *State*, No. 4223, opinion filed May 9, 1950; *Molsen* v. *State*, No. 4168, opinion filed February 14, 1950.

Although somewhat vague, medical testimony disclosed that the extension of claimant's left arm is limited about 45 per cent. Flexion is limited 10 per cent. Abduction is definitely limited, and there is minor limitation in swinging the arm forward and backward. Commissioner Wise, who heard the testimony, has recommended that claimant be given an award for 25 per cent loss of

use of left arm and with this recommendation we agree. See Angerstein: The Employer and the Workmen's Compensation Act of Illinois, Sec. 306.

Claimant also seeks to recover $36.00 for medical treatment and X-rays paid for by her. Aside from the fact that some of the treatment was for complaints not related to the accident, claimant elected to pay for this medical treatment herself, and respondent is not liable for this item. Sec. 8 (a), Workmen's Compensation Act.

Helen Heckman, Dixon, Illinois, was employed to take and transcribe the testimony before Commissioner Wise. Charges in the amount of $28.80 were incurred, which charges are reasonable. An award is, therefore, entered in favor of Helen Heckman for $28.80.

On the date of the accident, claimant was **64** years of age, married, but had no children under 16 dependent on her for support. Her earnings in the year preceding the date of the accident amounted to $2,100.00, and her rate of compensation is $19.50 per week.

During the time claimant was totally and temporarily disabled she was paid the sum of $385.00, but she was entitled to receive at the rate of $19.50 per week. only the sum of $250.71, or an overpayment of $134.29.

An award is, therefore, entered in favor of claimant, Belle Davis, under Section 8 (e) (13, 17) of the Workmen's Compensation Act, for 25 per cent loss of use of her left arm (56¼ weeks), being the sum of $1,096.87. From this should be deducted the overpayment of $134.29, leaving a net award of $962.58, all of which has accrued and is payable forthwith.

This award is subject to the approval of the Governor as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees."

(No. 4230—Claimant awarded $5,935.66.)

FRANCES LAPINSKI, WIDOW OF FRANK E. LAPINSKI, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 6, 1950.

W. BEN MORGAN, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award will be made under.* Where an attendant at the Elgin State Hospital while moving patients from a dormitory to a day room, and one of the patients struck at the employee, who raised his arm to fend off the blow, and in so doing lost his balance and fell sustaining intertrochanteric fracture of his left femur with comminution, was hospitalized and died within 10 days due to embolism, the claimant, widow of the deceased employee was entitled to an award under Section 7 (a) of the Act.

LANSDEN, J.

Claimant, Frances Lapinski, widow of Frank E. Lapinski, deceased, seeks to recover under the Workmen's Compensation Act for the death of her husband on September 12, 1949, allegedly as the result of an accidental injury which decedent sustained in the course of his employment on September 2, 1949.

No jurisdictional questions are involved in this case filed on October 1, 1949.

On the date of the accident decedent was employed by the Department of Public Welfare as an attendant at the Elgin State Hospital. While decedent was engaged in moving patients from a dormitory to a day room, one of the patients turned and struck at decedent, who raised his arm to fend off the blow. In so doing decedent lost his balance and fell, sustaining an intertrochanteric fracture of his left femur with comminution.

Decedent was immediately hospitalized at the institution's hospital under the care of staff doctors.

Decedent was scheduled for surgery the next day,

but this was canceled when decedent ran a temperature, the doctor in charge of the case fearing the onset of pneumonia. However, such never did develop, although X-ray findings disclosed evidence of pneumoconiosis in both lung fields. Penicillin was administered, and decedent's left leg was put in traction.

On September 6, 1949, lack of bowel sounds and the inability of decedent to expel an enema, indicated paralysis of the bowels. By September 10, 1949, this condition was cleared up and decedent was again scheduled for surgery, but on September 12, 1949, at about 11:30 P.M., he complained of difficulty in breathing. He was somewhat cold and clammy. Decedent suddenly expired that night, although he had been in good spirits and had made no complaints earlier in the evening,

Two doctors testified for claimant, one of whom was decedent's attending physician. Both were of the opinion that decedent's death was due to either a fat embolism from the fracture site being absorbed and carried to the lung or heart or a coronary occlusion. But such doctors tended to favor the former as the immediate cause of death primarily because a fat embolism occurs, if ever, four to fourteen days after the fracture, and in such type of comminuted fracture such could be expected in a certain number of cases. Coronary occlusion was apparently ruled out because of decedent's prior condition of good health. No doctors testified for respondent.

To hold that decedent did not die as a result of something directly traceable to the accident which occurred ten days prior to his death, would require this Court-to reject *in toto* the considered opinions of the two doctors who testified. This we shall and should not do. We, therefore, conclude that decedent's death resulted from the accidental injury which he sustained ten days prior to

his death, the 'samk arising out of and in the course of his employment. *Superior Coal Co.* v. *Ind. Com.,* 336 111. 568.

Claimant testified that she and decedent were married in 1904 and were still married at the time of his death. Three sons were born of this marriage. The sons were all of age at the time of decedent's death, and one of them was present with his mother at the hearing before Commissioner-Wise. Claimant and decedent had not lived together for five years prior to the date of the accident. She lived with one of her sons in Michigan, and decedent sent her only a very small amount of money because she did not need it, since she was also working. Decedent did visit her and the sons in Michigan in 1948. Claimant and decedent had planned to save money so they could buy a place in Michigan and live together again.

Claimant is entitled to an award as the widow of decedent under Section 7 (a) of the Workmen's Compensation Act, since he was under a legal obligation to support her. *Goelitz* Co. v. *Ind. Bd.,* 278 Ill. 164; *Smith-Lohr Coal Mining* Co. v. *Ind. Corn.,* 286 Ill. 34. No other persons are eligible to be included in the award.

On the date of the accident decedent was 65 years of age, and his earnings in the year prior thereto amounted to $2,131.37. The rate of compensation is $22.50 per week. The sum of $64.34 was paid to decedent from the date of his injury to the date of his death, although he performed no services for respondent. Such amount will have to be deducted from the award hereinafter entered, although part of it can properly be considered as compensation for temporary total disability, the remainder is for non-prcductive time. Section *7* **(a)** Workmen's Compensation Act.

Mary Alice Spring, Elgin, Illinois, was employed to

take and transcribe the testimony before Commissioner Wise. Her charges amounted to $37.00, and an award is entered in her favor for such amount.

An award is entered in favor of claimant, Frances Lapinski, under Section 7 (a), (L) of the Workmen's Compensation Act, in the amount of $6,000.00 less overpayment of $64.34, or a net award of $5,935.66, payable as follows:

$ 887.14, less overpayment of $64.34; or the sum of $822.80, which has accrued and is payable forthwith,

$5,112.86, payable in weekly installments of $22.50 beginning on June 13, 1950, for a period of 227 weeks, plus one final payment of $5.36.

All future payments being subject to the conditions of the Workmen's Compensation Act, jurisdiction of this case is specifically reserved for the entry of such further order as may be necessary.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4236—Claimant awarded $4,522.22 and Life Pension.)

VICTORIA GREEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 6, 1950.

ALBERT N. KENNEDY, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award will be made tinder.* Where an attendant employed in the Dixon State Hospital, while on duty in one of the wards of the mental institution was brutally assaulted and beaten by three patients, one of whom used a fire nozzle, and her condition was so severe that her survival for some time was doubted and there was no doubt that she was totally and permanently disabled, an award for such disability. with a life pension, will be made under Section 8(f) of the Act.

LANSDEN, J.

Claimant, Victoria Green, seeks to recover under the Workmen's Compensation Act for total permanent disability resulting from an accident that arose out of and in the course of her employment as an attendant at Dixon State Hospital, operated by the Department of Public Welfare. No jurisdictional questions are involved.

On June 12, 1949, claimant, while on duty in one of the wards of the mental institution was brutally assaulted and beaten by three patients, one of whom used a fire hose nozzle. Her injuries were so severe that it was doubted for some time she would survive. But there can be no doubt that claimant is totally and permanently disabled. Her testimony and that of two State doctors categorically leads to this inescapable conclusion.

Claimant sustained the following injuries: Five large and five small lacerations on her forehead and forepart of head (requiring 31 sutures); lacerations on inside of upper lip; bilateral hematoma on eyelids; abrasions and bruises on left side of neck; shock; comminuted fracture of frontal bone; fracture of left maxilla and fracture of nasal bone. She was almost scalped and her face was terribly mangled and deformed.

At the date of the hearing claimant still suffered from dizziness, instability, disturbance of central nervous system, loss of taste and hearing, high blood pressure aggravated by the injuries she sustained and difficulty in breathing through her nose. She was unable to perform any gainful employment, and both doctors stated her condition was permanent.

Claimant is, therefore, entitled to an award for total permanent disability with a life pension. 'Section 8 (f), Workmen's Compensation Act.

Claimant was 75 years of age at the time of the accident. She was a widow and had no dependents. Her earnings in the year preceding the date of the accident were $2,100.00, and her rate of compensation is, therefore, $19.50 per week.

The only confusing aspect of this case relates to payments for temporary total disability which must be deducted from the award for total permanent disability to reach a net award. Section 8(f), Workmen's Compensation Act. Respondent is of the opinion that maintenance furnished claimant at the rate of $32.00 per month should be credited against the amount of compensation paid. We cannot agree with this contention since it is more properly considered as a portion of the medical and hospital services respondent was required to furnish claimant. Section 8(a), Workmen's Compensation Act. Claimant was, however, paid her full wages of $175.00 for the first month after her accident and then was supposed to be paid five months at the rate of $105.00 per month, or a total of $700.00. For some reason or other she was paid only $677.78. She has thus been underpaid for temporary total disability.

At the date of the hearing claimant was and, as of today claimant is, still living at the hospital at Dixon State Hospital. She is thus still being furnished medical treatment and hospitalization. We hold that the deduction from the gross award to arrive at a net award should be $677.78.

Helen Heckman, Dixon, Illinois, .was employed to take and transcribe the testimony before the Commissioner and her charges therefor amount to $32.50, which is reasonable. An award is entered in her favor for such amount.

An award is entered in favor of claimant, Victoria

Green, in the amount of $5,200.00, less the sum of **$677.78,** or a net award of $4,522.22 plus a lifetime pension of 8 per cent of $5,200.00 or $416.00 per year payable monthly after said sum of $4,522.22 shall have been paid to claimant, said award being payable as follows:

$1,002.86 less payments already made on temporary total disability of $677.78, or the sum of $325.08 which has accrued and is payable forthwith;

$4,197.14 which is payable in weekly installments of $19.50 per week commencing on June 13, 1950, for 215 weeks plus one final payment of $4.64 and, thereafter, a pension for life payable monthly commencing one month after the date of the payment **of** said final payment of **$4.64** at the rate of $34.66.

Jurisdiction of this case is specifically reserved for the entry of such further orders as may from time to time be necessary. *Penwell* v. *State,* **11** C.C.R. **365,** and same case, No. 3025, opinion filed May 9, 1950.

This award is subject to the approval of the Governor as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees."

(No. 4248—Claimant awarded $5,200.00 and Life Pension.)

FRANK PEOPLES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 6, 19.50.

J. P. WILAMOSKI AND YOUNG & YOUNG, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*where an award will be made under.* Where an employee of the Division of Highways, as a laborer engaged in plowing snow on U. S. Route 34, and operating hydraulic controls on a plow, when the truck overturned and the employee was rolled about in the cab and wedged behind the steering wheel and sustained serious head and internal injuries resulting **in** permanent total

disability, an award for such disability with a life pension will be made under Section 8(f) of the Act.

SCHUMAN, C. J.

Claimant was employed by the Division of Highways as a common laborer with earnings of $1,727.90 in the year preceding his injury.

Claimant was injured on December 18, 1948, while plowing snow on U. S. Route 34 in Henry and Bureau Counties. He was operating hydraulic controls on the plow when the truck overturned and was rolled about in the cab and was wedged behind the steering wheel. A part of the steering wheel and column had to be cut off before he could be removed.

Claimant was taken to a hospital and seen by Dr. Bertelsen and Dr. Hoffman. A report by Dr. Bertelsen showed he treated claimant for a laceration over left eye, possible head injuries and bruises. He was seen by Dr. Smith, an eye specialist, on January 7, 1949, for a tearing of the left eye. Dr. Smith reported claimant had a partial facial paralysis and considerable tenderness over the maxillary and nasal bones. Dr. Smith estimated it would be six months before claimant would be in very good shape.

The departmental report showed claimant was seen on February 18, 1949, by a representative of the Division of Highways, and found claimant complaining of back pains. An examination by Dr. Hugh Cooper, a specialist in orthopedics, at Peoria, was made on February 22, 1949. Dr. Cooper reported claimant was extremely neurotic, shaky and nervous and upset over his injury.

Dr. Bertelsen saw claimant again on April 18, 1949, and reported claimant was an elderly, worried looking, and excitedly complaining man; that he complained of watering and burning of left eye, a burning sensation

and a deformity of the left temple, a mass in the throat in the thyroid region which sometimes shuts off his breath, a sore on the left edge of the lips, right shoulder pains at night and severe right groin soreness keeping him awake, swollen right testicle, numbness of the three lateral toes of the left foot, severe nervousness and shaking which was most marked on the right side. The doctor made a physical examination and gave his impression as follows:

1. Block of tear duct in left eye.
2. Mild arthritic changes.
3. Early extrapyramidal tract degeneration (Parkinsonism).
4. Acute anxiety neurosis.

Claimant was sent by the department' to Dr. Baer, a psychiatrist, at Peoria on April 29, 1949. Dr. Baer made the following report :

"The neurological examination reveals residuals of a left facial paralysis, rhythmical tremor **of** both upper extremities more marked on the right side, increased blood pressure 190/110 and tenderness in the left frontal area and over scars **of** his abdomen.

"The psychiatric examination reveals marked emotional instability, fearfulness, anxiety, depression, and increased tenderness."

Dr. Baer concluded claimant had both neurological and psychiatric complications following trauma *that was completely incapacitating* at the time.

Claimant was sent to the Illinois Neuropsychiatric Institute at Chicago on June 20, 1949. He was discharged from the hospital on August **12,** 1949. **A** complete report of his condition was reported by the hospital director on August 19, 1949, with the following diagnosis :

1. Traumatic Neurosis.
2. Diabetes Mellitus.
3. Hypertension.

and with the following report :

"At time of discharge on August **12,** 1949, he continued to offer his multiple complaints and evidenced no basic improvement. It is considered doubtful if he **will** ever recover sufficiently to-cope with his

responsibilities of employment. Certainly, he is not fit for work in his present state."

Dr. Hoffman reported on August 29,1949, that claimant was very emotional.

Claimant testified on February 17,1950, he was never sick a day in his life until his injury. That since the injury he has not been able to work. That it was stipulated on the trial that claimant had palsy in his right arm called Parkinson shaking. That claimant was 61 years of age and was unable since the injury to perform the sex act.

No jurisdictional questions were raised.

From all of the testimony in the record the Court concludes that claimant has complete disability, which renders him wholly and permanently incapable of work.

The record shows claimant was paid compensation from the date of the injury to September 30, 1949, in the amount of $796.75.

The testimony on the hearing was transcribed by William J. Cleary Co., who has submitted a statement of $47.00 for such services. This charge is reasonable.

All medical and hospital expenses have been paid by the State.

An award is therefore entered in favor of the claimant, Frank Peoples, in the amount of $5,200.00. Of this $796.75 has been paid to and including September 30, 1949, leaving a balance of $4,403.25, which is payable at the rate of $19.50 a week commencing on October 7, 1949, of which the sum of $682.50 has accrued to June 3, 1950. The balance of $3,720.75 to be paid at the rate of $19.50 for a period of 190 weeks commencing June 10, 1950, with one final payment of $15.75.

And thereafter a pension for life equal to 8% of

$5,200.00, or the sum of $416.00 payable annually in monthly installments of $34.66.

An award in the amount of $47.00 for stenographic services to William J. Cleary Co.

Future payments of compensation 'being subject to the terms and provisions of the Workmen's Compensation Act of Illinois, the jurisdiction of this cause is specifically reserved for the entry of such further orders as from time to time may be necessary.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees.''

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